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Supreme Court, U.S.
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No. 08-

IN THE

Supreme Court of the United States

AUREUS HOLDINGS, LTD. and DONALD SCHULTZ,

Petitioners,

v.

THE CITY OF DETROIT and JAMES DOCKERY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether the Sixth Circuit Court of Appeals erred in affirming the district court's decision to dismiss Plaintiff Shultz' 42 U.S.C. § 1983 action against Dockery on the grounds that the seizure of Schultz's shotgun was not so unreasonable as to violate Shultz's Fourth Amendment Constitutional rights.

2. Whether the Sixth Circuit Court of Appeals erred in affirming the district court's decision to dismiss Plaintiff Aureus' 42 U.S.C. § 1983 action against the City of Detroit for violations of the Fifth and Fourteenth Amendments on the grounds that Plaintiff's presented no evidence of a policy or custom that deprived them of procedural due process.

PARTIES TO THE PROCEEDING

Petitioners are Aureus Holdings, Ltd. (hereinafter "Aureus") and Donald Schultz (hereinafter "Schultz"). Respondents are The City of Detroit (hereinafter "Detroit") and James Dockery (hereinafter "Dockery").

STATEMENT PURSUANT TO RULE 29.6

Petitioner Aureus Holdings Ltd., has no parent corporation and no publicly held company owns 10% or more of its stock.

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OPINION BELOW

The opinion, in this matter, of the United States Court of Appeals for the Sixth Circuit is not reported. (**Appendice A**) The Sixth Circuit affirmed the decision of the United States District Court for the Eastern District of Michigan regarding Summary Disposition of Plaintiff's Fifth and Fourteenth Amendment claim (**Appendice C**) and Motion for New Trial regarding Plaintiff's Fourth Amendment claim. (**Appendice B**)

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The Sixth Circuit's opinion was rendered on December 9, 2008.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 42 United States Code, Section 1983.

Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for

redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

United States Constitution § Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution § Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution § Fourteenth Amendment

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Detroit Municipal Code § 30-1-17

> (b) When the consumer affairs department is presented with evidence which shows that probable cause exists to suspend or revoke a license, the department shall notify the licensee in writing of its intent to suspend or revoke the license specifying the reasons therefor and directing the licensee to show cause at a hearing before the director of the consumer affairs department or his designee why the license should not be suspended or revoked. The notice shall include the date, time and place for the show cause hearing which shall be scheduled not less than four (4) days from the date of service of notice.
>
> (c) If there is an immediate threat to the public health, safety and welfare, the license shall be suspended immediately and the licensee shall be notified by registered mail, and in person, if possible, specifying the reasons for the emergency suspension, and

scheduling a show cause hearing within thirty (30) days. Upon application in writing to the consumer affairs department, the licensee shall be entitled to a hearing within forty-eight (48) hours in order to ascertain whether emergency suspension shall continue.

(d) The licensee shall be given an opportunity at his show cause hearing to present reasons justifying his right to continue as a licensee and the department having jurisdiction over the occupation or business of such licensee shall be given an opportunity to present reasons justifying such suspension or revocation.

STATEMENT OF THE CASE

This is a 42 U.S.C. § 1983 case involving 4th, 5th and 14th Amendment Civil Rights violations by the City of Detroit and Detroit Police Officer James Dockery ("Dockery") against a Detroit scrap metal business, Aureus Holdings, Ltd. and one of its employees, Donald Schultz (hereinafter referred to as Plaintiffs "Aureus" and "Schultz," respectively). Plaintiffs Petition this Court to grant Certiorari on two issues: (1) Whether Dockery's warrantless seizure of a lawfully registered firearm that was mounted in plain view in a public place violates the Fourth Amendment; and (2) whether the City of Detroit's repeated practice of failing to follow a written policy evidences a *de facto* custom that deprived Aureus of procedural due process under the Fifth and Fourteenth Amendments.

1. Plaintiff's Fourth Amendment Claim

Between the months of May 2001 and January 2003 the Plaintiffs experienced relentless harassment by the City of Detroit and Detroit Police Officer James Dockery. On September 14, 2001 Dockery entered the office of Aureus' scrap yard and asked employee Schultz to produce personal identification. When Shultz, who had already been issued citations by Dockery on two previous occasions, was allegedly unable to do so, Dockery seized a shotgun that was mounted behind the customer service desk. The shotgun was lawfully registered and in plain view within the confines of the office. Dockery initially alleged that the weapon was an illegal sawed-off shotgun, however at deposition and trial he admitted that he knew the barrel was legal length. Plaintiffs brought charges against Dockery for violation of the Fourth and Fourteenth Amendment. The Judge instructed the jury to determine if Dockery had probable cause to seize the shotgun. The jury found in favor of Dockery.

Plaintiff's filed its Motion for New Trial alleging that the verdict was against the great weight of evidence. The Trial Court issued a Memorandum and Order stating that Dockery had probable cause to seize the firearm because Shultz had failed to produce identification, and therefore Schultz could not establish by a preponderance of evidence that the seizure of the shotgun violated his constitutional rights.

On Appeal the Sixth Circuit affirmed the Trial Court's determination regarding probable cause. In doing so, both the Trial Court and the Sixth Circuit

have effectively stretched the term "reasonable," as it relates to the Fourth Amendment, to an entirely new level. They have in fact declared that the seizure of a legally mounted firearm in a public place is constitutional even in the absence of probable cause that the weapon might be associated with criminal activity.

The Sixth Circuit's analysis stretches this Court's holding of *Peyton v. New York*, 445 U.S. 573 (1980) to an unparalleled degree. The Trial Court and Sixth Circuit's frighteningly casual dismissal of a clear constitutional violation of Plaintiff's civil rights warrants appellate examination by this Court.

2. Plaintiffs Fifth and Fourteenth Amendment Claim

On or about May 17, 2001, Schultz was present in the office area of the scrap yard when Dockery entered onto the premises and demanded that Schultz produce the business license under which Aureus was operating. Schultz was unable to produce a license 'proper' because Aureus had been lawfully operating on a license application since April 1, 2001. Nevertheless Dockery issued multiple citations for operating without a license to both Schultz, individually, and Aureus. As a result of the citations Aureus was forced to cease its operations pending the completion of the application process.

On May 25, 2001, Shultz opened the scrap yard to await the arrival of Detroit City Inspectors as part of the application process. Dockery arrived at the Scrap Yard and told Schultz and his co-worker James Behm that they were illegally operating without a business

license. He then issued citations to both Schultz and Behm. The City Inspectors eventually arrived after Dockery.

The business application process was finally completed on June 16, 2001, and a license was issued retroactively to April 1, 2001, whereupon Aureus reopened operations. However, on December 20, 2002 Dockery appeared at the Scrap Yard with John Fuqua, who identified himself as a representative of the City of Detroit Department of Consumer Affairs. The Department of Consumer Affairs is charged with administering the business application process. Mr. Fuqua demanded to see Aureus' business license, which was in plain view and hanging on the wall as was consistent with statutory requirements. Upon having the license pointed out to him, Mr. Fuqua pulled the license from the wall, confiscated it, and left the office. Plaintiffs did not have notice of the confiscation nor were they given an opportunity for a hearing on the matter. Dockery was present the entire time and was wearing his Detroit Police Department Uniform.

For two weeks following the unlawful confiscation of Aureus' business license, counsel for Aureus made numerous phone calls and sent correspondences demanding citation of the statutory authority under which the license had been confiscated. On January 10, 2003, Gwendolyn Lett, Business Licensing Supervisor of the Department of Consumer Affairs, had an assistant send the portion of the Detroit City Code that supposedly validated the basis for the revocation. This

cited portion of the Detroit City Code was § 30-1-17 states in relevant part:

> (b) When the consumer affairs department is presented with evidence which shows that probable cause exists to suspend or revoke a license, the department shall notify the licensee in writing of its intent to suspend or revoke the license specifying the reasons therefor and directing the licensee to show cause at a hearing before the director of the consumer affairs department or his designee why the license should not be suspended or revoked. The notice shall include the date, time and place for the show cause hearing which shall be scheduled not less than four (4) days from the date of service of notice.
>
> (c) If there is an immediate threat to the public health, safety and welfare, the license shall be suspended immediately and the licensee shall be notified by registered mail, and in person, if possible, specifying the reasons for the emergency suspension, and scheduling a show cause hearing within thirty (30) days. Upon application in writing to the consumer affairs department, the licensee shall be entitled to a hearing within forty-eight (48) hours in order to ascertain whether emergency suspension shall continue.
>
> (d) The licensee shall be given an opportunity at his show cause hearing to present reasons justifying his right to continue as a licensee

> and the department having jurisdiction over the occupation or business of such licensee shall be given an opportunity to present reasons justifying such suspension or revocation.

On January 14, 2003, counsel for Aureus sent correspondence to the Department of Consumer Affairs citing the unlawful deprivation of Aureus' property interest in its business license and demanding its return. Lett initially advised that the license had been issued in error by the Department due to the fact the crimes against property ("CAP") approval had not been received. In response to the counsel for Aueres' correspondence, Lett returned the license to Aureus in accordance with their demands. A show-cause hearing on the matter was never scheduled, as was required by Detroit City Ordinance.

Finally, in March 2003 Aureus resubmitted its annual license renewal and paid all required fees. The City Inspector reviewed the site and reported multiple violations. In response, Aureus requested a hearing with the City Building Inspector to address the alleged violations. The City did not respond to his request.

Plaintiffs filed a complaint against the City of Detroit alleging that its de facto practice of failing to grant hearings prior to or immediately following the deprivation of a property interest was a violation of procedural due process under the Fifth and Fourteenth Amendments.

Plaintiff's procedural due process claim was summarily dismissed on the grounds that they had failed to demonstrate that the City ". . . had a policy of deliberate indifference" in ignoring procedure in confiscating and failing to renew the business license of Aureus without due process of law. The Sixth Amendment affirmed. In its Memorandum and Order on the matter, the Sixth Amendment determined that Aureus had merely argued, and not demonstrated, that the City of Detroit had a *de facto* custom that was the moving force behind Plaintiff's constitutional deprivation.

The Trial Court and Sixth Circuit are wrong. The Plaintiffs in fact demonstrated that the City of Detroit had a pattern of repeatedly depriving Aureus of its business license without an opportunity for a hearing. Moreover the Detroit City Code specifically states that, depending on the nature of the circumstance, either a pre-revocation or post-revocation hearing is required. The issue of whether the City of Detroit's practice of ignoring its own Code constitutes a *de facto* policy that deprived Plaintiff of its Constitution Rights should have been submitted to the jury. In failing to do so, the Trial Court and the Sixth Circuit have both ignored this Court's holding in *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

REASONS FOR GRANTING THE PETITION

Dockery's seizure of Plaintiff's shotgun was a clear violation of the Fourth Amendment right to be secure from unreasonable searches and seizures. In its Memorandum and Order denying Plaintiff's Motion for New Trial, the Trial Court stated that the jury had reasonable grounds to determine that Dockery had probable cause to seize the shotgun based upon Schultz' inability to identify himself and justify ownership of the weapon. On Appeal, the Sixth Circuit affirmed.

By failing to reverse the trial court's denial of Plaintiff's Motion for New Trial, the Sixth Circuit has effectively supported the trial court's conclusion that seizure of a firearm in a private office behind a locked door and in plain view is reasonable even in the absence of probable cause that the weapon is associated with criminal activity. As such the question regarding the constitutionality of a warrantless seizure of a Shultz' weapon is effectively reduced to whether Schultz, who was not in possession of the weapon, had the ability to identify himself. Although several U.S. Court of Appeals have issued opinions relating to this matter (most notably the Ninth Circuit), this Court has heretofore declined to address the constitutionality of the warrantless seizure of a weapon that is clearly visible but not believed to be associated with criminal activity. Review of this matter is necessary in order to re-examine *Payton v. New York*, 445 U.S. 573 (1980) as it relates to the warrantless seizure of a visible weapon in a public place. Clearly there is a great deal of confusion relating to the breadth of the *Payton* doctrine, and the failure of this court to clarify the boundaries of a warrantless

seizure of a weapon has resulted, and will continue to result, in a manifest injustice for citizens similarly situated to the Plaintiffs.

In addition, the Trial Court's summary dismissal of Plaintiff's procedural due process claim was also improper, as Plaintiff's established that the City of Detroit's practice of failing to follow its own municipal code caused a deprivation of Aureus' property right. The Sixth Circuit erred in affirming the Trial Court's determination, and it narrowly construed the Plaintiff's burden involved in demonstrating that the illegal policy was the moving force behind the constitutional deprivation. The Sixth Circuit relied on *Thomas v. City of Chattanooga*, 398 F.3d 426 (6th Cir. 2005) in deciding that Plaintiff's proposed *de facto* policy amounted to little more than a "bald allegation." Just the opposite is true, in fact the Plaintiff established that the City Department of Consumer Affairs confiscated the Plaintiff's business license without a hearing and contrary to The City of Detroit's own municipal code. The City's custom of misapplying its own policies effectively created a pattern which acted to deprive the Plaintiffs of their procedural due process.

Monell v. Department of Social Services, 436 U.S. 658 (1978) clearly established that local governments may be liable for constitutional deprivations by a governmental custom that has not received formal approval through the body's official decision-making channels. *Id.* at 690. This Court should reexamine *Monell* and determine that the demonstration of a *de facto* policy of constitutional deprivation is appropriate grounds for recovery under 42 U.S.C. § 1983.

A REVIEW OF *PAYTON v. NEW YORK* IS WARRANTED TO CLARIFY THE CONSTITUTIONALITY OF A WARRANTLESS SEIZURE OF A WEAPON THAT IS CLEARLY VISIBLE BUT NOT ASSOCIATED WITH CRIMINAL ACTIVITY

1. The Sixth circuit's affirmation of the trial court effectively expands the scope of a seizure based probable cause to situations where criminal activity is not suspected.

By failing to reverse the Trial Court's denial of Plaintiff's Motion for New Trial, the Sixth Circuit has effectively supported the Trial Court's conclusion that the seizure of a mounted firearm in plain view and in a public place is reasonable even in the absence of probable cause that the weapon is associated with criminal activity. In any § 1983 action, the Plaintiff must prove a violation of underlying constitutional rights; elements of proof and defenses must be tailored to fit a particular constitutional guarantee that has allegedly been violated. See *Daniels v. Williams*, 474 U.S. 327, 337 (1986).

In the instant matter, the Plaintiff presented evidence establishing that Dockery had previously met Shultz on several occasions prior to September 14, 2001, and that he had issued both Shultz and his employer Aureus Holdings Ltd. multiple citations for failure to maintain a business license. On September 14, 2001 Dockery entered the premises and demanded that Schultz produce identification, which Schultz was unable to do. Dockery then demanded that Schultz hand him a shotgun that was lawfully registered and lawfully in

plain view within the confines of the office. Shultz complied and Dockery then confiscated the weapon, alleging that it was an illegally modified "sawed-off" shotgun. In reality, the shotgun was merely a "camp" or "pack" pistol-grip shotgun and that was registered by the Plaintiff and entirely legal in the State of Michigan and City of Detroit. Dockery left the Scrap Yard with the shotgun after issuing Schultz a misdemeanor citation for failing to present identification. The confiscated shotgun was returned to Schultz later that evening after he presented at the 11th Precinct requesting that the firearm be returned.

Plaintiff does not dispute that Dockery was lawfully entitled to enter the premises, as Aureus' office was a public place. However, Dockery's seizure of the shotgun, for no apparent reason other than Schultz' inability to show his identification, deprived the Plaintiffs of their constitutional right against unreasonable seizures.

The Fourth Amendment of the United States Constitution guarantees:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The issue of warrantless searches and seizures was perhaps most notably examined by this Court in *Payton*

v. New York 445 U.S. 573 (1980). Although *Payton* was primarily a matter concerning warrantless searches and seizures of the apartment of two felony suspects, *footnote 25* of the Court's opinion on the matter famously states the following:

> Yet it is also well settled that objects such as weapons or contraband found in public places may be seized by the police without a warrant. The seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity.

Id. at 586.

The question regarding a warrantless search in a public place was address in *U.S v. Mines,* 883 F.2d 801 (9th Cir. 1989). In *Mines* the Ninth Circuit held that a Defendant's consent to search his bag at an airport included consent to examine a machine gun found in plain view inside the bag, notwithstanding defendant's claim that a second search occurred with the detective picked up the machine gun and turned it over to observe serial numbers. Citing *Payton*, the Ninth Court observed that objects such as weapons. . .found in a public place, may be seized by the police without a warrant. *Id.* at 804. The Court however did note that because the Defendant was at an airport his expectation of privacy was sharply reduced because searches of persons and luggage to detect potential hijackers are commonplace. *Id.* Although the Court stopped short of suggesting that the type of public place was necessarily

indicative of the person's expectation of privacy, it seems clear that a consensual search in a place where the person would expect to be searched has some bearing on whether there exists a Fourth Amendment violation.

On the matter of probable cause, federal courts seem to be reluctant to find a constitutionally permissible search when there is no pre-existing reason for the law enforcement officer to have suspicion of the item to be seized. For example, in *United States v. Gonzalez*, 334 F. Supp. 2d 275 (E.D. N.Y 2004), the district court held that the seizure of photographs from Defendant's apartment was impermissible under the Fourth Amendment when the detectives were unaware of their incriminating character and where probable cause was established only after the photographs were removed from the apartment. The Sixth Circuit first observed that a seizure conducted without a warrant based upon probable cause is per se unreasonable under the Fourth Amendment. (citing *Minnesota v. Dickerson*, 508, U.S. 366, 372 (1993). The per se rule is subject to only a few specifically established and well-delineated exceptions. (citing *Katz v. United States*, 389 U.S. 347 (1967). The Court eventually followed the rule promulgated by this Court that if the police are lawfully in a position from which they can view an object, if its incriminating character is immediately apparent, and if the officers have the lawful right to access the object, they may seize it without a warrant. *Id.* at 278-279 (citing *Minnesota v. Dickerson*, 508 U.S. at 372 (1993).

The facts surrounding the instant matter contain elements of both *Mines* and *Gonzales*. On the one hand, Shultz certainly consented to Dockery's search of the

shotgun in Aureus' office, however an office is certainly not the type of public place where an employee would expect to be searched by a law enforcement officer. On the other hand the simple fact that Shultz, who had multiple dealings with Dockery in the past, did not have his personal identification available that day is a feeble justification for probable cause to confiscate the weapon. Finally, Dockery there is no indication that Dockery seized the weapon based upon his belief that it was related to any criminal activity. Simply put, there is no inherently "incriminating character" about a mounted shotgun in a public place.

Footnote 25 in *Payton* purports to bestow law enforcement officials with a tremendous amount of flexibility in deciding for themselves when they may lawfully seize a weapon in a public place. The issue in this case is whether Dockery had probable cause to seize the weapon despite the fact that (1) he knew the weapon itself was legal; (2) he knew Mr. Schultz' identity from their previous encounters; and (3) Schultz's legal possession and display of the gun was not connected to the investigation of any alleged illegal activity. All three facts seem contrary to the guidelines of *Peyton's* footnote 25.

The Trial Court erred when it determined that the jury's verdict was not against the great weight of evidence. Plaintiff's constitutional protection against unreasonable seizures was violated by Dockery because *Peyton* does not allow for a seizure of property absent probable cause and criminal activity.

THE CITY'S CUSTOM OF MISAPPLYING ITS OWN POLICIES CREATES A PATTERN WHICH ACTED TO DEPRIVE PLAINTIFFS OF PROCEDURAL DUE PROCESS

1. The Sixth Circuit affirmation of the trial court's summary dismissal of Plaintiff's procedural due process claim results is based upon a narrow and incorrect interpretation of Monell v. Department of Social Services.

Aureus established that the City of Detroit instituted a custom, policy or practice that caused Aureus a deprivation of their protected property right without due process of the law under the Fifth and Fourteenth Amendments of the Constitution. Although the Sixth Circuit's Memorandum and Order correctly examines Plaintiff's burden to establish municipal liability under § 1983, its analysis regarding the existence of a policy completely overlooks the possibility that the City of Detroit's repeated practice of failing to follow its own municipal code amounts to a de facto policy of constitutional deprivation.

The Fourteenth Amendment provides that:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Moreover, a Defendant's right to Procedural Due Process is derived from the Fifth Amendment, which states in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury .... nor be deprived of life, liberty, or property, without due process of law. . .

Finally, in order to establish a claim based on 42 U.S.C. § 1983 against a local municipal defendant, a plaintiff must plead and prove a custom, policy and/or procedure which caused a violation of plaintiff's constitutional rights. *Monell*, 436 U.S. at 661 (1978).

Under *Monell*, local governments "may be sued for constitutional deprivations visited pursuant to governmental custom even though such a custom has not received formal approval through the body's official decision-making channels." *Monell*, 436 U.S. at 690. Where a high-ranking official of a local government body or a similar official in one of its departments declares or otherwise establishes a policy which, when executed by them or a subordinate, leads to a constitutional violation, under *Monell* the local government and/or the official may be liable under 42 U.S.C. § 1983 even if there is no formally declared policy or procedure. See *Id.*

The procedure followed by the City of Detroit through its Department of Consumer Affairs in revoking Aureus's business license was a violation of Aureus's right to procedural due process under the Fifth and Fourteenth Amendments. When questioned

regarding the initial revocation, Gwendolyn Lett, Supervisor of the Business License Division of the City Department of Consumer Affairs, referenced Detroit City Code § 30-1-17 (stated *supra*). Accordingly, the Code states that when probable cause to revoke a license exists, the licensee shall receive notice and an opportunity to be heard at a show cause hearing. The Code also states that a license may be immediately suspended when threat to public health, however the licensee *shall* be entitled to a show cause hearing within 30 days.

The initial revocation of Aureus' business license occurred on December 20, 2002. No hearing was conducted either prior to or following the revocation, and Plaintiffs did not even receive a formal explanation for it until more than three weeks later. The eventual explanation was that the license was erroneously issued in the first place. The Plaintiffs however were never invited to participate in a show cause hearing to determine if they were allowed to lawfully operate their business despite the Department's erroneous issuance of the license.

Aureus resubmitted its annual license renewal application in March 2003 and paid all required fees. It also submitted proof that it had passed all required annual inspections save the inspection by the City Building Inspector done on March 31, 2003. Following his inspection, the City Building Inspector authored a report citing a punch-list of corrections that needed to be made. In response, Aureus requested an "office hearing" to address the alleged violations. Aureus' request was made in accordance with City regulations.

The City of Detroit did not respond to Aureus' request for a hearing.

On May 23, 2003 counsel for Aureus sent correspondence to the Department of Consumer Affairs and the aforementioned Gwendolyn Lett, demanding that the approval of Aureus's annual renewal be issued, or in the alternative, that the Department initiate and schedule a hearing in accordance with the above cited Detroit City Code provisions governing renewal. For the third time, the City failed to respond, schedule a hearing or conduct a follow-up inspection.

The City and Dockery claimed in their Motion for Summary Judgment that the evidence developed by discovery simply demonstrates a series of individual citations for specific ordinance and state law provisions concerning business licensing or environmental violations, and that arguably, these specific allegations only support claims against Dockery, and not the City. However, that was not the issue here, nor is it the standard. The City, as the moving party for summary dismissal, bore the burden of demonstrating that there were no material issues of fact. See *Celotex Corp v. Catrett*, 477 U.S. 317 (1986).

The issue presented by the Plaintiff was that the City, through its Department of Consumer Affairs, instituted a *de facto* policy of deliberate indifference in ignoring proscribed procedure when it confiscated, and then failed to renew, the business license of Aureus without due process of the law in violation of the Fifth and Fourteenth Amendments of the U.S. Constitution.

The Trial Court's Summary Dismissal of Plaintiff's charge of 5th and 14th Amendment violations of procedural due process was in error.

2. *Aureus produced evidence that the City of Detroit maintained a pattern that effectively deprived Aureus of procedural due process.*

To constitute a violation of § 1983, not only must a Plaintiff have been denied a right, privilege or immunity without due process of law that is without opportunity or notice of a hearing, but such deprivation must have been under color of a state statute, ordinance, regulation, custom or usage. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982).

To sufficiently allege the existence of a municipal policy or custom, for purposes of stating a cause of action against a municipality under § 1983, a plaintiff must allege the existence . . . . of the following:

> (3) a practice so persistent and widespread that it constitutes a custom or usage and implies the constructive knowledge of policy-making officials; or Morrell

Monell, 436 U.S. at 659 (1978).

The Plaintiff has produced clear evidence of two separate occasions whereby it was denied a property interest without a hearing, and one instance where it requested a hearing and was ignored. All three violations occurred following Plaintiff's request for a hearing regarding either the deprivation or renewal of its business license by the City of Detroit.

As described in *Monell*, a Plaintiff need not demonstrate an actual written policy in order to maintain standing under § 1983. In fact, a combination of actions by a group of associated government employees has been found sufficient to demonstrate a *de facto* policy.

In *Reed v. Village of Shorewood*, 704 F.2d 943 (7th Cir. 1983), the Seventh Circuit held that the continuous interference by the local municipality against a nightclub's business was sufficient to state a claim under § 1983. In *Reed*, the owners of a local rock-and-roll bar contended that a police officer, the police chief, and virtually the entire small government of the village, interfered with and destroyed their business in violation of the due process clause of the Fourteenth Amendment. The Defendant's actions of arbitrarily arresting Plaintiff's patrons, refusing to renew the bar's liquor license without a hearing, and interference with Plaintiff's eventual efforts to sell the club created a genuine issue of material fact concerning alleged violations of Plaintiff's constitutional rights. *Id.* 951.

Furthermore in *Altaire Builders v. Village of Horseheads, et al.*, 551 F. Supp. 1066 (W.D. N.Y. 1982), a civil rights action was brought by the Plaintiffs alleging that the town board of trustees' action in denying approval of a planned unit development was arbitrary, capricious and unreasonable and therefore denied Plaintiff use of its property by due process of law. The policy or custom alleged in this matter was the unconstitutional application of the zoning scheme itself, which stated that ". . .no building permit or certificates of occupancy shall be issued except where all the provisions of this ordinance have been complied with".

Id. at 1077-1078. The Court essentially determined that the decisions of the Zoning Board were binding on the village itself and therefore its members were those officers whose acts may be said to represent official policy.

Similar to *Reed* and *Altaire* the City of Detroit's policy regarding hearings and the Department of Consumer Affair's de facto policy of revoking business licenses without hearings was not perpetuated by a single individual but an array of government employees. The repeated harassment, deprivation of property, delay in reprisal and absence of hearings altogether represents a policy or custom that deprived Aureus of its Procedural Due Process Rights. In addition, all of Aureus's written demands regarding the license were sent to the Director of the Department of Consumer and Industry Service and copied to the Detroit City Mayor. The highest members of the City Government were aware of the confiscation of the license by Fuqua and Dockery and of the subsequent failure of the Department of Consumer Affairs to schedule a license renewal and/or revocation hearing. Furthermore there was no attempt by the City of Detroit to invite the Plaintiff to participate in a pre-revocation or post-revocation hearing. Although the City's deprivation of procedural due process was not pursuant to an actual policy, *Monell* clearly indicates that a government may be sued for a constitutional deprivation pursuant to a custom even if the custom does not have formal approval. *Monell*, 436 U.S. at 690.

The City of Detroit's practice of failing to follow its own policy evidences a pattern of activity which, on

multiple occasions, acted to deprive Aureus of procedural due process. This Court should re-examine *Monell* and determine that the demonstration of a *de facto* policy of constitutional deprivation is appropriate grounds for recovery under 42 U.S.C. § 1983.

CONCLUSION

For the reasons stated herein, Petitioners Aureus Holdings Ltd. and Donald Schultz respectfully request this Honorable Court grant review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED DECEMBER 9, 2008

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 07-2195

AUREUS HOLDINGS, LTD.
and DONALD SCHULTZ,

Plaintiffs-Appellants,

v.

DETROIT CITY and JAMES DOCKERY,

Defendants-Appellees,

and

DETROIT POLICE DEPARTMENT,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

MEMORANDUM OPINION

Appendix A

BEFORE: ROGERS, SUTTON and McKEAGUE, Circuit Judges.

McKEAGUE, Circuit Judge. This case stems from something of a feud between Aureus Holdings, Ltd., a scrap metal processor operating in the City of Detroit, and Detroit Police Officer James Dockery, acting in his capacity as Environmental Enforcement Officer. Aggrieved by various actions taken by Officer Dockery, plaintiffs Aureus and Donald Schultz, an Aureus employee, brought suit in the Eastern District of Michigan, asserting various federal and state causes of action. The district court granted defendants' motion for summary judgment in part, dismissing all claims against the City, and conducted a five-day jury trial on Aureus's remaining claims against Dockery. In trial, the district court awarded Dockery judgment as a matter of law on some claims and the jury returned a verdict in Dockery's favor on all remaining claims. The court subsequently denied Aureus's motion for new trial. On appeal, we find no error in the proceedings below and therefore affirm the district court's judgment.

I

Plaintiffs Aureus and Schultz raise several claims of error. We address them in the order presented. The first asserted error relates to Schultz's Count II claim under 42 U.S.C. § 1983 that his Fourth Amendment right to freedom from unreasonable seizures was violated when Dockery, without probable cause, temporarily seized his shotgun from the Aureus scrap

yard office on or about September12, 2001. Schultz contends the jury's verdict is against the clear weight of the evidence and that the district court erred by denying his motion for new trial. The district court denied relief because the evidence of the circumstances surrounding the seizure of the shotgun was controverted and the jury was entitled to accept Dockery's version of the events rather than Schultz's. The court thus ruled that Schultz had failed to establish by a preponderance of the evidence that the seizure violated his Fourth Amendment rights.

We review the district court's denial of new trial for abuse of discretion. *Taylor v. Teco Barge Line, Inc.*, 517 F.3d 372, 383 (6th Cir.2008). The trial court will be deemed to have abused its discretion if the challenged verdict is so contrary to the clear weight of the evidence that a reasonable juror could not have reached it. *Id.*

Schultz maintains that even accepting Dockery's version of the events, probable cause to seize the shotgun was not established. Schultz argues that even assuming he told Dockery he was not in charge, and told Dockery that he owned the shotgun observed in plain view in the office but refused to produce personal identification, this does not amount to probable cause to believe an offense had been committed justifying seizure. Yet, Dockery explained that inasmuch as Schultz was uncooperative, claimed ownership of a shotgun displayed in the office of a business he claimed not to be in charge of, and refused to produce personal ID or proof of ownership, he was not comfortable, from a public

safety perspective, leaving the loaded shotgun there. Dockery testified that he therefore invited Schultz to follow him to the police station where ownership could be verified and the shotgun could be returned to him. Schultz did so and, upon producing personal ID and admitting that he was in fact the manager of the Aureus facility, the shotgun was returned to him.

In light of this testimony, the jury, having been properly instructed on the law, was entitled to conclude that this temporary seizure was not so unreasonable as to violate Schultz's constitutional rights. The jury's verdict was not plainly unreasonable and the district court's denial of the motion for new trial was not an abuse of discretion.[1]

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1. For the same reasons, we find no abuse of discretion in the district court's refusal to instruct the jury on awarding punitive damages for this claim. *See Taylor*, 517 F.3d at 387 (district court's refusal to give requested instruction reviewed for abuse of discretion). The record does not contain evidence even suggesting that Dockery, in temporarily removing the shotgun, acted so maliciously, wantonly or oppressively as to justify award of punitive damages. *See Memphis Cmty. School Dist. v. Stachura*, 477 U.S. 299, 307 n. 9, 106 S.Ct. 2537, 91 L.Ed.2d 249 (1986) (punitive damages are available in § 1983 case only for acts "maliciously, or wantonly, or oppressively done"). Moreover, even if the refusal to give a punitive damages instruction were in error, it was harmless inasmuch as the jury's verdict was in favor of Dockery.

Appendix A

II

In the second claim of error, Aureus and Schultz challenge the district court's denial of their motion for new trial on the Count III claim for malicious prosecution. Again, they contend the jury's verdict in favor of Dockery was against the clear weight of the evidence. The district court treated the claim as a state law claim (and so instructed the jury) and determined that plaintiffs' proofs failed to satisfy two essential elements of the claim. The court noted that plaintiffs had to prove they were subject to prosecution without probable cause, which prosecution terminated in their favor. *See Matthews v. Blue Cross & Blue Shield of Michigan*, 456 Mich. 365, 572 N.W.2d 603, 609-10 (Mich.1998). Yet, of the numerous citations issued to Aureus and Schultz—for disposal of waste oil, dumping, operating without a certificate of occupancy, etc.—the court found evidence of the disposition of only nine. These nine were dismissed without prejudice pursuant to a stipulation that required Aureus to install storage tanks for the disposal of waste products. Reasoning that the jury was entitled to view this as evidence that the citations were issued with probable cause and that the proceedings were not terminated in plaintiffs' favor, the court concluded that the jury's verdict was not shown to be unreasonable. *See Peterson Novelties, Inc. v. City of Berkley*, 259 Mich.App. 1, 672 N.W.2d 351, 363-64 (Mich.App.2003) (where termination results from compromise or settlement, there is no "favorable termination" for purposes of malicious prosecution claim).

On appeal, Aureus and Schultz do not even address the district court's reasoning. Instead, they rehash their litany of grievances over petty harassments inflicted on them during this period. They do not identify a single prosecution, criminal or civil, that terminated in their favor. We are not persuaded that the district court abused its discretion in denying the motion for new trial on the Count III malicious prosecution claim.

III

In Count IV of the complaint, Aureus asserts a claim against Dockery for tortious interference with advantageous business relationship or expectancy. This claim is premised in part on the closure of the Aureus scrap yard operation from May 17, 2001 to June 13, 2001. Dockery issued a citation and ordered the business closed when he learned on May 17, 2001, that Aureus did not have a valid license to operate. Aureus applied for a license later on May 17 and was directed by the Department of Consumer Affairs to stay closed pending approval of the license application. It is undisputed that Aureus was without a valid license during this twenty-six-day period. Concluding that the closure was due to the undisputed lack of a license, not to any tortious interference by Dockery, the district court, during trial, precluded Aureus from seeking damages for profits lost during this period.

Aureus contends the district court erred as a matter of law. Citing the City of Detroit Ordinance, Aureus contends the City was obligated to ("shall") issue the

license as soon as the application fee was paid, on May 17. Since the City was legally obligated to issue the license on May 17, Aureus argues Dockery lacked legal authority to enforce the closure after May 17. Dockery's continued enforcement of the closure without legal authority is thus said to constitute tortious interference with Aureus's business relations.

Even if we were to accept Aureus's questionable construction of the ordinance, its argument would still fall short. Even if the Department of Consumers Affairs ought to have issued Aureus a license on May 17, the fact is that it did not do so. The Department of Consumer Affairs took almost four weeks to process the application before issuing the license. Although the closure undoubtedly visited hardship on Aureus, the City's alleged nonfeasance and Aureus's resultant loss cannot be attributed to Dockery under a tortious interference theory. To make out a valid claim for tortious interference under Michigan law, Aureus was required to show that Dockery acted without legal justification *and* with malice. *See Mino v. Clio School Dist.*, 255 Mich.App. 60, 661 N.W.2d 586, 597 (Mich.App.2003); *BPS Clinical Labs. v. Blue Cross & Blue Shield of Michigan*, 217 Mich.App. 687, 552 N.W.2d 919, 925 (Mich.App.1996). The fact that Aureus was actually without a license during the period of closure by express order of the Department of Consumer Affairs precluded a finding that Dockery's enforcement of the closure was with malice. We therefore find no error in the district court's order limiting the scope of Aureus's claim for tortious interference damages.

Appendix A

IV

Insofar as the complaint set forth a claim under 42 U.S.C. § 1983 for denial of equal protection, the district court awarded judgment to Dockery as a matter of law for lack of evidence that Aureus and Schultz were treated differently from others similarly situated, citing *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000). Again, plaintiffs' appellate arguments are unresponsive to this identified deficiency. They failed to allege or show that they were discriminated against because of their membership in any suspect class and they have not pointed to evidence that they were treated less favorably than others similarly situated, such as would support a "class of one" equal protection claim. *See TriHealth, Inc. v. Board of Com'rs, Hamilton County, Ohio*, 430 F.3d 783, 788 (6th Cir.2005). Accordingly, we find no error in the district court's ruling on the equal protection claim.

V

Counts V and VI of the complaint state claims against Dockery for intentional and negligent infliction of emotional distress. During trial, the district court awarded Dockery judgment as a matter of law on these claims as well. The court found the evidence of Dockery's conduct, "whatever the shortfalls," certainly insufficient to satisfy the "extreme and outrageous" element of the intentional infliction claim. Further, the court found the evidence insufficient to justify a reasonable jury finding that Dockery's enforcement

excesses were the product of gross negligence, as would have been required to avoid the governmental immunity Dockery enjoyed under Mich. Comp. Laws § 691.1407(2).

On appeal, Schultz insists there was enough evidence to create a jury question. Under Michigan law, it is generally the trial court's duty to determine in the first instance whether a defendant's conduct may reasonably be regarded as "so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Lewis v. LeGrow*, 258 Mich.App. 175, 670 N.W.2d 675, 689 (Mich.App.2003) (quoting *Graham v. Ford*, 237 Mich.App. 670, 604 N.W.2d 713, 716 (Mich.App.1999)). The trial court answered this question in the negative after hearing Schultz's entire testimony.

It appears Dockery may have performed his duties with excess zeal on occasion. Yet, while Schultz experienced anxiety as a result, he did not seek medical or mental health treatment, such as might support a finding that Dockery's conduct was truly extreme, atrocious and intolerable. Nor does the evidence suggest that Dockery's conduct could be fairly characterized as "reckless" or "grossly negligent." In sum, Schultz has, in his appellate arguments, simply failed to draw our attention to any evidence that persuades us the district court erred in this respect.

VI

Finally, Aureus contends the district court erred, in its summary judgment ruling, when it dismissed all claims asserted against the City of Detroit. Aureus does not quarrel with the district court's conclusion that the only claim properly asserted against the City is contained in Count VII, which alleges, under 42 U.S.C. § 1983, that Aureus's business license was confiscated on December 20, 2002 without due process. However, the district court construed the claim against the City as logically flawed. Indeed, Aureus alleges that Dockery and others participated in the confiscation of the license in a manner violative of the City's own policies. Yet, as the district court noted, citing *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), to impose liability on the City under § 1983, Aureus must establish that City officials were acting pursuant to a City custom or policy.

We review the order granting summary judgment de novo. *Johnson v. Karnes*, 398 F.3d 868, 873 (6th Cir.2005). Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The court must view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in its favor. *Johnson*, 398 F.3d at 873. Not just any alleged factual dispute between the parties will defeat an otherwise properly supported

motion for summary judgment; the dispute must present a *genuine* issue of *material* fact. *Leadbetter v. Gilley*, 385 F.3d 683, 689-90 (6th Cir.2005). A dispute is "genuine" only if based on evidence upon which a reasonable jury could return a verdict in favor of the non-moving party. *Hedrick v. W. Reserve Care Sys.*, 355 F.3d 444, 451 (6th Cir.2004). A factual dispute concerns a "material" fact only if its resolution might affect the outcome of the suit under the governing substantive law. *Id.*

Aureus acknowledges its burden to demonstrate that the alleged confiscation and non-renewal of its license were accomplished pursuant to City policy. To satisfy this burden, Aureus argues that, notwithstanding the City's official policies, which were allegedly ignored in this case, "the City, through its Department of Consumer Affairs, instituted a de facto policy of deliberate indifference in ignoring prescribed procedure in confiscating, then failing to renew, the business license of Aureus without due process of the law."

Granted, Aureus may establish municipal liability under § 1983 upon a showing that the City had "a custom of tolerance or acquiescence of federal rights violations." *Thomas v. City of Chattanooga*, 398 F.3d 426, 429 (6th Cir.2005). To prevail on such a theory, however, Aureus must demonstrate, by a preponderance of the evidence, that: there was a clear and persistent pattern of illegal activity; the City had notice of it; the City tacitly approved the unconstitutional activity such that its deliberate indifference amounts to an official policy of

inaction; and this custom or policy of inaction was the moving force behind the constitutional deprivation. *Id.* Yet, as the district court observed, Aureus has merely *argued* the existence of such a policy of inaction or "de facto policy" and has adduced no *evidence* of a pattern of similar activity. Such bald allegations are clearly insufficient to forestall summary judgment. We therefore find no error in the district court's award of summary judgment in favor of the City.

VII

For the foregoing reasons, we deny all of appellants' claims of error and **AFFIRM** the district court's judgment in all respects.

APPENDIX B — MEMORANDUM AND ORDER DENYING PLAINTIFFS' MOTION FOR NEW TRIAL OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION FILED SEPTEMBER 5, 2007

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 03-75126
Hon: AVERN COHN

AUREUS HOLDINGS, LTD. and
DONALD SCHULTZ,

Plaintiffs,

-vs-

James DOCKERY, Defendant.

MEMORANDUM AND ORDER DENYING PLAINTIFFS' MOTION FOR NEW TRIAL

Appendix B

I.

This is a civil rights case under 42 U.S.C. § 1983 with pendent state law claims. On July 23, 2007, following a five (5) day trial, a jury returned a verdict in favor of defendant and against plaintiffs on the following claims:

- Aureus Holdings, Ltd. - malicious prosecution
  - tortious interference with business expectancies
- Donald Schultz - violation of constitutional rights in seizing a shotgun
  - malicious prosecution

Now before the Court is plaintiffs' motion for new trial on the following grounds:

- the verdict against Schultz on his claim regarding the seizure of his shotgun was against the clear weight of the evidence
- the verdict against Schultz and Aureus on their claims for malicious prosecution was against the clear weight of the evidence

- the verdict against Aureus on it claim for tortious interference with business expectancy was against the clear weight of the evidence

- Schultz was entitled to go to the jury on his claim for punitive damages on the shotgun claim

- Schultz was entitled to go to the jury on his claim for intentional and negligent infliction of emotional distress

- Schultz and Aureus were entitled to go to the jury on their claims for violation of equal protection

For the reasons which follow, the motion is DENIED.

II.

The background of the case and the issues which were tried to the jury are described in the Memorandum and Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment, filed June 1, 2006, as well as in the Joint Final Pretrial Order approved February 6, 2007. Essentially, Aureus operated a scrap metal processing yard in the City of Detroit. Schultz was employed by non-party E & M Transportation, Inc. at the scrap yard to supervise its trucks and drivers delivering scrap metal to the yard.

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Dockery is a City of Detroit police officer assigned to environmental enforcement, who issued a series of citations to plaintiffs for violation of various City of Detroit ordinances.

Aureus and Schultz filed a multi-count complaint against Dockery, the City of Detroit Police Department (later dismissed by stipulation), and the City of Detroit. Following dispositive motions filed by the City of Detroit (which was dismissed) and Dockery, the case went to trial against Dockery on the following claims:

- Schultz's § 1983 claim regarding the shotgun
- Schultz and Aureus' claims for malicious prosecution
- Aureus' claim for tortious interference with its business
- Schultz's claim for intentional and negligent infliction of emotional distress
- Schultz's and Aureus' § 1983 claim for violation of their 14th Amendment right to equal protection

At the conclusion of plaintiffs' proofs, the Court granted Dockery's motion for judgment as a matter of law under Rule 50 on Schultz's emotional distress claims and plaintiffs' equal protection claims.

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III.

A.

Under Fed Rule Civil Procedure 59(a), a court may grant a motion for a new trial "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." The rule has been construed as encompassing such grounds as a verdict against the clear weight of the evidence, an inconsistent verdict, an excessive award of damages, an error of law during the trial, prejudicial misconduct by the court, opposing counsel, or a juror that deprived the moving party of a fair trial. *See Robert E. Jones, et al.*, Fed. Civil Trials & Evidence, Ch. 20, ¶¶ 20:100-243 (2001 ed.). As one commentator has explained:

> It may be doubted whether there is any verbal formula that will be of much use to trial courts in passing on motions of the type now being considered. Necessarily all formulations are couched in broad and general terms that furnish no unerring litmus for a particular case. On the other hand, the trial judge does not sit to approve miscarriages of justice. The judge's power to set aside the verdict is supported by clear precedent and common law and far from being a denigration or a usurpation of a jury trial, has long been regarded an integral part of trial by jury as we know it. On the other hand, a decent respect for the collective wisdom of the jury,

> and for the function entrusted to it in our system, certainly suggests that in most cases the judge should accept the findings of the jury, regardless of his own doubts on the matter. Probably all that the judge can do is balance these conflicting principles in the light of the facts of the particular case. If, having given full respect to the jury's findings, the judge on the entire evidence is left with the definite and firm conviction that a mistake has been committed, it is to be expected that he will grant a new trial.

Charles Alan Wright, et al., *Federal Practice and Procedure* Civil 2d § 2806 (2d ed.1995) (footnotes omitted).

B.

The law relating to the substantive claims which went to the jury is set forth in the jury instructions, to which there was no objection. The instructions follow:

a. Seizure of the Shotgun

> . . . the first claim is Mr. Schultz's 1983 claim. . . . This relates to the shotgun. Mr. Schultz filed this action in part under the provisions of the United States Code of Laws entitled Title 42 Section 1983, which gives a person a right to bring a lawsuit for a violation of a constitutional right by a police officer acting in an official capacity.

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. . .

. . . Mr. Schultz claims that Mr. Dockery violated his rights under the Fourth Amendment to the United States Constitution. This amendment reads:

> The right of the people to be secure in their person, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause supported by oath or affirmation particularly describing the place to be searched and the person or thing to be seized.

Every person has a constitutional right to be free from an unreasonable seizure of their property by a law enforcement agent. You must determine whether the seizure which you find took place was reasonable under constitutional standards of probable cause. It is for you to determine whether or not Mr. Dockery had probable cause to seize the shotgun.

b. Malicious Prosecution

. . . the second claim that each of the plaintiffs has is malicious prosecution. The elements of a malicious prosecution claim are the following:

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A prosecution caused or continued by one person against another, termination of the proceeding in favor of the person who was prosecuted, absence of probable cause for initiating or continuing the proceeding—initiating or continuing the proceeding with malice or the primary purpose other than that of bringing the offender to justice.

The plaintiff has the burden of proving each of the following: Mr. Dockery caused or continued a prosecution against the plaintiff, the proceeding was terminated in favor of the plaintiff, Mr. Dockery initiated or continued the proceeding without probable cause, Mr. Dockery initiated or continued a proceeding with malice or a primary purpose other than of bringing the offender to justice.

If you find the plaintiff has proved each of these elements as I have explained them to you, your verdict will be for the plaintiff on this [claim].

. . . if you find that, in effect, the proceeding terminated in favor of a plaintiff, then the plaintiff is to prevail on this claim. If Mr. Dockery had probable cause based on the facts and circumstances known to him at the time he initiated the proceeding and believed that the plaintiff was guilty of an offense—of the offense stated in the citation and if you

believe that the citation for the reasons stated in it was proper, then the plaintiff cannot prevail on this claim.

c. Tortious Interference

. . . Aureus claims that Dockery intentionally and improperly interfered with its business relationship or expectancy with its customers. In order to establish this claim, Aureus has the burden of proving each of the following: Aureus had a business relationship or expectancy with customers at the time of the claimed interference, the business relationship or expectancy had a reasonable likelihood of future economic benefit for Aureus, Dockery knew of the business relationship or expectancy at the time of the claimed interference, Dockery intentionally interfered with the business relationship or expectancy, Dockery improperly interfered with the business relationship or expectancy, Dockery's conduct caused the customers to disrupt or terminate the business relationship or expectancy, Aureus was damaged as a result of Dockery's conduct.

Your verdict will be for Aureus if you find that it has proved all of these elements. Your verdict will be for Dockery if you find that Aureus has failed to prove any one of these elements.

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The relationship or expectancy need not be evidenced by a contract, but there must be a realistic expectation. The law requires more than wishful thinking, hope or optimism. What is required is a reasonable likelihood or probability of future economic benefit for Aureus.

When I say that Aureus must prove that Dockery intentionally interfered with the business relationship or expectancy, I mean that Dockery's primary, but not necessarily sole, purpose was to interfere with Aureus' business relationship or expectancy or Dockery acted knowing that his conduct was certain or substantially certain to cause interference with Aureus' business relationship or expectancy.

Improper interference is conduct that is fraudulent, not lawful, not ethical or not justified under any circumstances. If Dockery's conduct was lawful, it is still improper if it was done without justification and for the purpose of interfering with Aureus' business relationship or expectancy, but Aureus must specifically show affirmative acts by Dockery that corroborate that Dockery had the wrongful purpose of interfering with Aureus' business relationship or expectancy.

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> A plaintiff must prove that the defendant caused the harm or injuries that it allegedly suffered. In determining the question of causation, you should decide whether Dockery's wrongful conduct was a substantial factor, and the resulting injury or harm need not be the only cause nor the last or nearest cause. It is sufficient if it occurs with some other cause acting at the same time which in combination with it causes the injury.

d. Infliction of Emotional Distress and Equal Protection

The law relating to a claim for infliction of emotional distress and for a violation of equal protection will be discussed below as neither claim went to the jury.

IV.

A.

Two versions of the shotgun incident were presented to the jury, Shultz's and Dockery's. Dockery's version is discussed in the trial record at Trial Transcript, Vol 4, pages 37-40 and 69-70. The jury obviously gave more credence to Dockery's version of the events than Schultz's. The jury, in finding against Schultz, decided that Dockery had probable cause to take the shotgun given that Schultz declined to identify himself and to justify his ownership of the shotgun. Based on the evidence at trial, the Court accepts the

findings of the jury that Schultz failed to establish by a preponderance of the evidence that the seizure of the shotgun violated his constitutional rights. Thus, Schultz is not entitled to a new trial on this ground.

B.

As to the malicious prosecution claim of Schultz and of Aureus, while the record reflects a number of citations issued by Dockery for various violations of City of Detroit ordinances between May 27, 2001 and the end of the year to Aureus and Schultz. However, a number of the citations were not issued to either Schultz or to Aureus. The reasons for the citations varied: disposal of waste oil, dumping, operating without a certificate of occupancy, etc. They are described in Exhibits 2 through 26. Nine (9) of the citations were dismissed without prejudice under a stipulation and order in the 36th District Court which reads:

> It is stipulated that the parties to the above captioned matters having agreed that if the property located at 17245 Mt. Elliott, Detroit, Michigan was remediated by the installation of storage tanks for the disposal of waste products then the above-captioned cases would be dismissed, and that said tanks having been installed it is the intention of the parties to dismiss the above-captioned matters.

There was no evidence at trial as to the disposition of fourteen (14) of the citations, and two (2) of the citations

appeared not to have been served. The jury, based on the evidence at trial, had a basis to conclude that Dockery had reasonable cause to issue citations for the illegal disposal of waste oil which were the only citations recited in the stipulation and order. The jury could also reasonably have found that given Aureus' agreement to install storage tanks, that the proceedings in the 36th District Court did not terminate in favor of Schultz or Aureus. Again, based on the evidence at trial, the Court accepts the findings of the jury on the malicious prosecution claims of Schultz and Aureus. A new trial is not warranted on these claims.

C.

As to the tortious interference claim of Aureus, there was no evidence at trial that its relationship with its customers was adversely affected by the citations issued by Dockery, or that any activity by Dockery outside the issuance of the citations adversely affected Aureus' ability to do business. Additionally, the jury could reasonably have found that Dockery's intention was not to interfere with Aureus' business relationships but rather to assure that the use of the scrap yard conformed to city ordinances and was environmentally sound. There was ample evidence at trial for the jury to find that the scrap yard was an environmental mess given the way it was being operated. As such, Aureus is not entitled to a new trial on this claim.

D.

Schultz says he is entitled to a new trial because of the failure of the Court to allow the jury to consider punitive damages on the shotgun claim. Given the fact that the jury did not find liability on the claim in the first instance and the Court having found no basis to order a new trial on this claim, the failure to give a punitive damages instruction, if any, is harmless.

E.

Aureus and Schultz further argue that the Court erred in withholding from the jury the claims of intentional infliction of emotional distress and negligent infliction of emotional distress. Although the Michigan Supreme Court has not formally recognized a claim for intentional infliction of emotional distress, the Michigan Court of Appeals has set forth the elements as follows: (1) extreme and outrageous conduct; (2) intent or recklessness; (3) causation; and (4) severe emotional distress. *Lewis v. LeGrow*, 258 Mich.App. 175, 196, 670 N.W.2d 675 (2003). The elements of a negligent infliction of emotional distress claim are: (1) serious injury threatened or inflicted on a person, not the plaintiff, of a nature to cause severe mental disturbance to the plaintiff, (2) shock by the plaintiff from witnessing the event that results in the plaintiff's actual physical harm, (3) close relationship between the plaintiff and the injured person (parent, child, husband, or wife), and (4) presence of the plaintiff at the location of the accident at the time the accident occurred or, if not present, at

least shock "fairly contemporaneous" with the accident. *Hesse v. Ashland Oil, Inc.*, 466 Mich. 21, 34, 642 N.W.2d 330 (2002).

The Court did not err in withholding these claims from the jury. First, whatever the shortfalls in Dockery's conduct, it cannot be said that it was extreme and outrageous based on the evidence. Second, given that the jury found against Dockery on the shotgun and malicious prosecution claims, there was certainly insufficient evidence to go to the jury on a claim for negligent infliction of the emotional distress. Moreover, as Dockery explains in its response, he is likely immune from such a claim.

F.

Finally, Aureus and Schultz argue that their equal protection claim should have gone to the jury. Generally, equal protection claims involve members of a certain class alleging that they are being treated differently from members of another class. *See Shaw v. Reno*, 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993). However, the United States Supreme Court has upheld the "class of one" principle for equal protection claims by a citizen alleging unequal treatment by a state actor where the plaintiff alleges that he has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000). *See also* Nicole Richter, Note, *A Standard for "Class of One"*

Appendix B

Claims Under the Equal Protection Clause of the Fourteenth Amendment: Protecting Victims of Non-Class Based Discrimination from Vindictive State Action, 35 VAL. U.L.REV.. 197 (2000-2001).

Here, neither Aureus nor Schultz introduced any evidence of a similarly situated entity (metal scrap yards or its managers) which was treated differently. Because they failed to produce evidence on an essential element, the claim was properly removed from the jury's consideration.

SO ORDERED.

s/ Avern Cohn
AVERN COHN
UNITED STATES DISTRICT JUDGE

Dated: September 5, 2007

APPENDIX C — MEMORANDUM AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION FILED JUNE 1, 2006

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 03-75126

HONORABLE AVERN COHN

AUREUS HOLDINGS, LTD. and
DONALD SCHULTZ,

Plaintiffs,

v.

CITY OF DETROIT and JAMES DOCKERY,

Defendants.

MEMORANDUM AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Appendix C

I. Introduction.

This is a civil rights case under 28 U.S.C. § 1983 with pendant state law claims. Plaintiff Aureus Holdings Ltd. (Aureus) is a scrap metal processor doing business as Magnum Recycling Incorporated (Magnum). Aureus operates a scrap yard in Detroit, Michigan (the Scrap Yard). Plaintiff Donald Schultz (Schultz) worked at the Scrap Yard at different times for Aureus and non-party E & M Transportation, Inc. (E & M), a company that delivers metal to the Scrap Yard.

Plaintiffs claim that Defendant James Dockery (Dockery), a Detroit Police Officer assigned to the Environmental Enforcement Section of the Detroit Police Department (DPD),[1] issued numerous citations against Aureus and Schultz without probable cause, and in other ways harassed plaintiffs, under a de facto policy approved by Defendant City of Detroit (City), thus depriving plaintiffs of numerous constitutional rights.

The claims are:

Count 1: violation of the Second and Fourteenth Amendment for illegally seizing a shotgun;

Count 2: violation of the Fourth and Fourteenth Amendment for illegally seizing a shotgun;

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1. The DPD was initially a defendant in the case; the parties stipulated to its dismissal.

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Count 3: malicious prosecution in violation of the Fourteenth Amendment by issuing citations without probable cause against each plaintiff to harass them;

Count 4: tortious interference with a business relationship in violation of the Fourteenth Amendment for making criminal allegations against plaintiffs to frighten away customers, clients, and employees;

Count 5: intentional infliction of emotional distress in violation of the Fourteenth Amendment through extensive harassment;

Count 6: negligent infliction of emotional distress in violation of the Fourteenth Amendment through extensive harassment;

Count 7: deprivation of a property interest without due process of law in violation of the Fourth, Fifth, and Fourteenth Amendments for revoking Aureus' business license, failing to renew the business license, all in contrary to the City Code.

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As the Court reads the complaint, not withstanding plaintiffs failure to differentiate, the parties to each claim are as follows:[2]

- Counts 1, 2, 3, 5, and 6: Schultz's claims against Dockery;
- Counts 3 and 4: Aureus' claims against Dockery.
- Count 7: Aureus' claim against the City.

Before the Court is Defendants' motion for summary judgment. At a March, 2006, hearing on the motion, the Court asked plaintiffs to submit supplemental papers setting forth the basic factual predicate for Count 3 (malicious prosecution and harassment) and Count 7 (deprivation of business license). Plaintiffs have complied with the request and the motion is ripe for decision. For the following reasons, the motion will be denied in part and granted in part.

II. Background.

A.

The chronology of events as best can be discerned from the parties' papers is as follows.[3]

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2. At a hearing on the motion plaintiffs counsel concurred with the Court's reading of the complaint.

3. Some of the events are uncertain due to the vagueness of the papers.

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Aureus entered into an agreement with Consumers Scrap (Consumers) in early 2001 for the lease and purchase of the Scrap Yard and Magnum trade name. Aureus took control of operations under a lease in April, 2001. Aureus began operating the Scrap Yard without a license.[4]

Metal shavings are among the materials delivered to the Scrap Yard from automobile manufacturers. Metal shavings are coated with cutting oil. Some oil drains into the ground when the shavings are deposited at the Scrap Yard.

On May 17, 2001, Dockery came to the Scrap Yard where Schultz and Thomas Pallisco (Pallisco), an Aureus employee, were working. Dockery asked to see Aureus' business license. Aureus had never applied for a business license in its own name. Pallisco was cited for operating the Scrap Yard without a business license, for failing to have a certificate of occupancy, and for violations of state environmental laws because oil was being dumped on the ground and draining into the public sewer system. Plaintiffs say Pallisco was not served with the citations and copies of the citations were not provided.[5] Dockery advised Pallisco and Schultz to

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4. Aureus says it operated under a "transferred license" from Consumers, but does not point to any part of the City's code providing for a transfer.

5. Plaintiffs say the citations were discovered during discovery. The citations were dismissed on December 15, 2005, pursuant to a motion by Pallisco for failure to prosecute.

close the Scrap Yard. That same day, Aureus applied for a business license; the Department of Consumer Affairs (DCA) instructed Aureus to stay closed pending approval of the license application.

On May 25, 2001, at about 7:00 a.m., with the license application still pending, Schultz and James Behm (Behm) opened the Scrap Yard to prepare, plaintiffs say, for an inspection as part of the application process. Dockery and an unknown officer arrived at the Scrap Yard soon thereafter. Presumably Schultz, Behm, Dockery, and the unknown officer discussed the activity at the Scrap Yard. Dockery issued the following citations: two to Schultz, for operating without a certificate of occupancy (# V-508-853 and # V-508-856); one to Aureus, for the improper disposal of waste oil (# V-508-881); and, to two to Behm, for unknown reasons (likely # V-508-854 and # V-508-855).[6] Schultz says

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6. Plaintiffs say Dockery issued four citations on this day. But plaintiffs have provided copies of only three citations, and listed five citation numbers that likely were issued on this date given the chronological citation numbers. These inconsistencies make it difficult for the Court to get a complete understanding of the facts. Plaintiffs did provide a notice of hearing issued to Behm for a misdemeanor violation that occurred on May 25, 2001.

The Court understands that Dockery issued numerous citations against numerous entities and individuals on different days. Adding to its confusion, however, is that no party provided the Court with a copy of each citation, or even a list of each citation, the date it was issued, who it was issued to, and the

(Cont'd)

Dockery threatened to arrest him and impound equipment on the premises. Schultz says the unknown officer indicated that it could appear that they were operating the Scrap Yard, but agreed that they were not.

On or about June 6, 2001, Schultz says that while he waited for inspectors, about six DPD motorcycle officers parked in front of the Scrap Yard and revved their engines in a harassing manner for an unknown duration until Schultz left the Scrap Yard, thus missing the inspectors. No document supports Schultz' assertion.

On June 16, 2001, Aureus received a license retroactive to April 1, 2001.[7]

On June 21, 2001, Schultz says about four DPD motorcycle officers stopped in front of the Scrap Yard, revved their engines, and turned their sirens on and off in a harassing manner for an unknown duration and then left.[8] Schultz says he went home an hour early because

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(Cont'd)
basis for the citation. Plaintiffs list a total of 15 citations against Aureus, E & M, Magnum, Schultz, Marie Hallman, and Behm combined, but provided copies of 10 citations. Plaintiffs say some of the citations were not immediately served, but do not say how or when each was subsequently discovered or whether the cited person/entity paid any fine for the unserved citations.

7. It appears that the license was issued retroactive to April 1 because the City license cycle begins on April 1 of each year.

8. Plaintiffs provide no details of this activity.

he was agitated. No document supports Schultz' assertion.

On or about July 17, 2001, Schultz says six DPD motorcycle officers and one police cruiser stopped in front of the Scrap Yard and revved their engines, and turned their sirens on and off in a harassing manner for an unknown duration. Schultz says he felt agitated but stayed and finished the day. No document supports Schultz' assertion.

On or about August 18, 2001,[9] Schultz says a marked DPD cruiser entered the Scrap Yard, chirped its siren and then left. It is unknown how long the cruiser was in or around the Scrap Yard. No document supports Schultz' assertion.

B.

On or about September 9, 2001, plaintiffs say Dockery issued two citations to Aureus for the illegal disposal of waste oil. Plaintiffs say the citations were not served and that there is no record of them. It is unknown when or how these citations were discovered.

On September 12, 2001, Dockery entered the office at the Scrap Yard and asked Schultz for the business license. A shotgun was in plain view in the office. Schultz

9. Schultz's written and unsworn statement says this event occurred on August 3, 2001, about two weeks earlier. This inconsistency is of no significance.

showed Dockery the license, which was hanging on the wall. Schultz says Dockery asked him for identification and that he complied. Schultz says Dockery then demanded that he give him the shotgun.[10] Schultz says Dockery told him the shotgun was illegal and took it. Dockery says he asked Schultz who owned the shotgun and that Schultz said he did not know, so he took it. Dockery told Schultz he could get the shotgun back at the 11th Precinct. Schultz says Dockery issued three citations to him for: (1) the illegal disposal of waste oil, (2) the failure to present identification,[11] and (3) the improper disposal of anti-freeze.[12]

After Dockery left, Schultz called the State and City police in an attempt to get back the shotgun. Schultz was able to retrieve the shotgun that evening at the 11th Precinct. Schultz says he asked a police officer at the precinct to make a police report that Dockery had

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10. As the Court reads the papers, Schultz owns the shotgun.

11. No party cites the law violated for failing to provide identification to Dockery.

12. None of these citations were provided to the Court. Based on the ticket numbers and assuming the citations were issued in chronological order, plaintiffs' list has four citations that Dockery likely issued on this day (# V-509-567 through # V-509-570). Plaintiffs provided only one, # V-509-570, and that citation peculiarly is dated October 7, 2001. There is no explanation for this anomaly. This fourth citation is issued to Schultz for the illegal disposal of waste oil.

stolen the shotgun. Schultz says he was told a report would be filed; no report was filed.

On September 17, 2001, Aureus' attorney sent Dockery a letter telling Dockery to stop harassing the people and activity at the Scrap Yard. The letter also stated that Dockery must have a search warrant to enter the Scrap Yard.

On September 26, 2001, Dockery issued the following citations: one each to "Marie Hellman" (# V-509-584) and Aureus (# V-509-585) for the illegal disposal of waste oil. Marie Hallman, not Hellman, is the wife of an Aureus officer, but has never been to the Scrap Yard. It is unclear when and how these citations were served on or discovered by plaintiffs, and whether Dockery visited the Scrap Yard on this day.

On or about October 1, 2001, Dockery cited "RM Transportation" (likely E & M) for the illegal disposal of waste oil at the Scrap Yard (V-509-604).[13] It is unclear when and how the citation was served on or discovered by E & M, and whether Dockery visited the Scrap Yard on this day.

On or about October 4, 2001, Dockery cited Magnum for the illegal disposal of waste oil (V-509-622). It is

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13. This citation along with the following citations are listed in chronological order based on the date on each citation even though the corresponding citation numbers are not in numerical order. Neither party mentions, let alone explains the reason for, this irregularity.

unclear when and how the citation was served on or discovered by Magnum, and whether Dockery visited the Scrap Yard on this day.

On or about October 5, 2001, Aureus says Dockery cited it for the illegal disposal of waste oil. There is no record of this citation.

On or about October 7, 2001, Dockery cited Schultz for the illegal disposal of waste oil (V-509-570). This citation is numerically close to the citations likely issued on September 12, 2001, and is discussed in footnote 12, supra.

On October 10, 2001, Aureus completed the purchase of the Scrap Yard from Consumers. Aureus became the owner and operator of the Scrap Yard.

On or about October 16, 2001, Dockery blocked the entrance/exit to the Scrap Yard with his police cruiser. Dockery exited the cruiser and photographed the Scrap Yard. It is unclear how long Dockery was at the Scrap Yard. Schultz says Dockery's visit made him very agitated and he left work early. Before leaving, Dockery cited E & M (# V-509-601) and Magnum (# V-509-619) for the illegal disposal of waste oil. It is unclear when and how the citations were served on or discovered by E & M and Magnum.

On or about October 18, 2001, Dockery parked his police cruiser near the gate to the Scrap Yard, got out of the cruiser, and stood and watched the Scrap Yard for about an hour before leaving.

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Plaintiffs say Dockery issued the following citations, but no document exists:

- November 19, 2001: one to Magnum for the illegal disposal of waste oil (it is unclear whether this citation was served or not);

- December 20, 2001: one each to Magnum, E & M, and Pallisco for the illegal disposal of waste oil (plaintiffs say these citations were never served and there is no record of them).

From May through December, 2001, plaintiffs say Dockery issued a total of 25 citations relating to the operations at the Scrap Yard; ten of the citations were issued to Aureus and/or Magnum, and six were issued to Schultz. No hearing took place in 2001, as all scheduled hearing dates on the citations were postponed.

Dockery issued no more citations. The following chart[14] sets forth all alleged citations. The Court was provided with copies of the citations that are in bold italics.

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14. The citations with unknown citations numbers, unknown recipients, unknown causes, and/or unknown service are included based on representations by plaintiffs.

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CITATIONS ISSUED BY DOCKERY.

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C.

In January, 2002, Aureus hired a consultant to test the Scrap Yard's pollution conditions. The consultant concluded that Aureus was compliant with state oil disposal requirements because the oil at the Scrap Yard was not petroleum-based.

On February 19, 2002, Aureus' counsel, Dockery, and a representative of the City and Wayne County prosecutors' offices met to resolve the citations[15] under the supervision of a 36th District Court judge.[16] Aureus denied liability on the environmental citations and offered the consultant's test results as evidence that the oil on the metal shavings was environmentally sound and not petroleum based. Dockery had no test results supporting the citations. To resolve the citations, Aureus agreed to install two underground storage tanks at the Scrap Yard to capture the lubricants. The City agreed. Dockery was aware of this resolution.

In April, 2002, Aureus leased the Scrap Yard to TC Associates for a five year term, but retained the right

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15. It is unclear whether all of just the environmental citations were considered at the meeting.

16. It is unclear whether this meeting was a settlement conference or a formal judicial proceeding. It is unclear whether any formal judicial proceedings ever took place on the citations before their dismissal.

to operate out of the yard during the lease.[17] Also in April, 2002, Aureus renewed its license for the Scrap Yard in 2002.

D.

In September, 2002, the Michigan Department of Environmental Quality (MDEQ) and the Detroit Water and Sewerage Department (DWSD) received an anonymous tip that illegal dumping of fluids was occurring at the Scrap Yard and began investigating. Plaintiffs say Dockery was the source of the tip.

In November, 2002, the MDEQ and the DWSD conducted a joint visit to the Scrap Yard.

On or about December, 13, 2002, the MDEQ sent a 10-page Letter of Warning to Aureus, Magnum, and E & M. The letter enumerated 14 complaints of possible wrongdoing.

E.

On December 17, 2002, Aureus contracted to install the storage tanks pursuant to the settlement negotiated at the February, 2002, meeting at the 36th District Court. The storage tanks cost more than $100,000.

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17. Under the lease, TC Associates operated the consumer side of the business and Aureus operated the commercial side. Aureus and TC Associates shared office space and the surrounding grounds.

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On December 20, 2002, Dockery and John Fuqua (Fuqua), a DCA representative, came to the Scrap Yard office. It is unclear what employees were at the Scrap Yard. Fuqua asked to see Aureus' license, which was hanging on the wall. Aureus says Fuqua pulled the license from the wall, took it, and left. Dockery was present during this exchange, but denied any connection to Fuqua's visit. It appears Aureus ceased operating the Scrap Yard after Fuqua and Dockery left.

Over the next month following Fuqua's visit, Aureus' counsel left numerous messages and sent numerous letters to Gwendolyn Lett (Lett), a DCA supervisor, to determine why Fuqua had taken the license. Aureus also sent letters to the Director of Building and Safety Engineering and the Mayor of the City. Lett initially reported that the DCA had erred in issuing the license because the "Crimes Against Property" (CAP) approval had not been received. Aureus says CAP approval had not been a concern when the license was renewed in April, 2002. Aureus says Lett reported that Dockery and Fuqua contributed to the decision to take the license.

On January 17, 2003, Lett returned the license to Aureus.

In March, 2003, Aureus applied to renew the license. On March 31, 2003, a City building inspector reported that the Scrap Yard required numerous corrections to pass inspection. Aureus disputed the inspector's report. In April, 2003, Aureus twice requested an "office hearing" or re-inspection in accordance with City

regulations to contest the report. No hearing or re-inspection occurred.

In May, 2003, Aureus sent a letter to Lett requesting a hearing, or that the license be renewed. The current status of the license is unresolved.

On November 6, 2003, the 36th District Court certified that the storage tanks had been installed, and dismissed nine of the citations. It is unclear which citations were dismissed.[18] Satisfied by the measures Aureus had taken, the MDEQ closed its investigation on November 18, 2003.

On December 22, 2003, Aureus and Schultz filed suit.

III. Discussion.

A. Legal Standard.

Summary judgment will be granted when the moving party demonstrates that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). There is no genuine issue of material fact when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

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18. It is also unclear what happened to the citations that were not dismissed, or whether any citations resulted in fines.

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The nonmoving party may not rest upon his pleadings; rather, the nonmoving party's response "must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). Showing that there is some metaphysical doubt as to the material facts is not enough; "the mere existence of a scintilla of evidence" in support of the nonmoving party is not sufficient to show a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Rather, the nonmoving party must present "significant probative evidence" in support of its opposition to the motion for summary judgment in order to defeat the motion. *See Moore v. Philip Morris Co.*, 8 F.3d 335, 340 (6th Cir.1993); *see also Anderson*, 477 U.S. at 249-50. Additionally, and significantly, "affidavits containing mere conclusions have no probative value" in summary judgment proceedings. *Bsharah v. Eltra Corp.*, 394 F.2d 502, 503 (6th Cir.1968).

The Court must decide "whether the evidence presents a sufficient disagreement to require submission to a [trier of fact] or whether it is so one-sided that one party must prevail as a matter of law." *In re Dollar Corp.*, 25 F.3d 1320, 1323 (6th Cir.1994) (quoting *Anderson*, 477 U.S. at 251-52). The Court "must view the evidence in the light most favorable to the non-moving party." *Employers Ins. of Wausau v. Petroleum Specialties, Inc.*, 69 F.3d 98, 101 (6th Cir.1995). Determining credibility, weighing evidence, and drawing reasonable inferences are left to the trier of fact. *See Anderson*, 477 U.S. at 255. Only where there are no genuine issues of material fact and the moving

party is entitled to judgment as a matter of law may summary judgment be granted. *Thompson v. Ashe*, 250 F.3d 399, 405 (6th Cir.2001).

B. Analysis.

1. Introduction.

a.

To succeed under 42 U.S.C. § 1983 a plaintiff is required to show: (1) that he was deprived of a right secured by the Constitution or laws of the United States; and (2) the deprivation was caused by someone acting under color of state law. *Perry v. McGinnis*, 209 F.3d 597, 603 (6th Cir.2000). State law tort claims find their support in the common law.

b.

The City makes the following arguments in support of summary judgment on Count 7:[19] (1) Aureus cannot establish the existence of a municipal custom, policy or practice; and (2) Aureus does not have a protected property right to a business license under the due process clause of the Fourteenth Amendment.

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19. As the Court reads the complaint, Count 7 contains two procedural due process claims by Aureus against the City: (1) for the seizing of the license, and (2) for the failure to renew the license. Though unstated, the Court presumes that a business must display a license to operate.

c.

Dockery makes the following arguments in favor of summary judgment on Counts 1 through 6:(1) Schultz's state tort law claims (Counts 3 through 6) can not be asserted under the federal Constitution; (2) Schultz has no individual right of action under the Second Amendment; and (3) Dockery is entitled to qualified immunity on Count 2.[20]

2. The City: the Presence of a Municipal Custom.

a. Introduction.

Despite Aureus' attempt to implicate the City in all counts, Count 7 is the only claim against the City. Aureus says the City was deliberately indifferent to the conduct of its employees who revoked the license and failed to renew Aureus' license without due process.

A political subdivision is liable under § 1983 if its official policies or informal customs cause a constitutional violation. *Heflin v. Stewart County, Tennessee,* 958 F.2d 709, 716 (6th Cir.1992). To state a claim against a municipality, a plaintiff must show that the municipality, through custom or policy, caused the alleged constitutional violation. *Monell v. Dept. of Social Services,* 436 U.S. 658 (1978). A municipality cannot be

20. Given the confused nature of the complaint, the Court has restated Aureus and Schultz's claims in a cohesive fashion as will be seen.

vicariously liable under § 1983 for a constitutional violation caused by an employee or agent. *Monell*, 436 U.S. at 694. Rather, a local government can be liable only when a government action is "so permanent and well settled as to constitute a custom or usage with the force of law," *Davenport v. Simmons*, 192 F.Supp.2d 812, 824 (W.D.Tenn.2001), or when the government's official policy is the "moving force of the constitutional violation." *Monell*, 436 U.S. at 694. *See also Pembaur v. City of Cincinnati*, 475 U.S. 469 ("municipal liability under § 1983 attaches where-and only where-a deliberate choice to follow a course of action is made from among various alternatives . . .").

b. Discussion.

Aureus says the revocation of the license constituted an illegal seizure in violation of procedural due process. Aureus says the license revocation occurred without Fuqua or Dockery having probable cause or following the City Code's revocation procedures, which require a hearing. Aureus says Lett, as a DCA supervisor, instructed Fuqua to take the license contrary to the Code and without notice. Aureus says it contacted the highest levels of City government seeking the return of the license, meaning the City implemented an official policy in seizing the license.

Aureus also says the City and the DCA subsequently refused to renew the license, re-inspect the Scrap Yard, schedule a hearing, or otherwise follow the Code's procedures governing license applications. Plaintiffs say

the City has not sustained its burden of demonstrating that there are no material issues of fact as to whether the City, through the DCA, was deliberately indifferent to the proscribed procedures when it failed to renew the license.

c. Resolution.

Aureus says its procedural due process right to the license was violated when Dockery, Fuqua, Lett, and perhaps others, took the license, and then, after returning it, failed to renew it, all in contravention of the Code. In so stating, Aureus contradicts the very assertion it is trying to make. On one hand, Aureus says the City created a policy that violated its constitutional rights. On the other hand, Aureus say the City failed to follow its own license revocation and renewal policies, which Aureus admits are constitutional. What Aureus disputes is Dockery, Fuqua, Lett, and perhaps others' failure to follow the policy. However Aureus presents no evidence that any City official capable of creating policy had any knowledge of Dockery, Fuqua, or Lett's revocation of the license. Aureus instead simple asserts a *"de facto"* official policy or custom from the circumstances. There is no evidence of a pattern of similar activity. In cases where no official policy exists, Aureus' remedy is to sue the individuals who violated its constitutional rights, not the City.[21]

21. The only evidence of Dockery's involvement in the license revocation was his accompanying Fuqua to the Scrap Yard to seize the license. Dockery only carried out a police function and, as plaintiff's counsel admitted at the March, 2006, hearing, cannot be liable in such circumstances.

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3. The City: Aureus' Property or Liberty Interest in the License.

In addition to the City's challenge to Aureus' claim that the City had an official policy that violated the Constitution, thus giving rise to municipal liability, the City says Aureus' procedural due process claim against the City for taking and failing to renew the license must be dismissed because Aureus lacks a protected property or liberty interest in the license. Due to the lack of a municipal policy, as discussed above, the City cannot be held liable for Count 7 even if a protected property or liberty interest exists. It is unnecessary, therefore, to decide whether Aureus has a property or liberty interest in the license protected by procedural due process

4. Dockery: State Tort Claims As a Basis for § 1983 relief.

As pled, Counts 3, 4, 5, and 6 are state common law tort claims against Dockery that Aureus or Schultz, depending on the count, say rise to a constitutional violation under the Fourteenth Amendment. Section 1983 only provides a mechanism to seek redress for rights arising under the federal Constitution, and does not create a federal right of action under the Fourteenth Amendment for every violation of state tort law. *Paul v. Davis*, 424 U.S. 693, 701 (1976). Thus, as pled, the claims do not set forth constitutional violations.

Instead, the Court reads these counts in two ways: (1) as pendent state law claims; and (2) taken together as an equal protection violation under the Fourteenth Amendment.[22] The Court reads these counts both ways, meaning plaintiff has asserted pendant state law claims, and overall a claim that Dockery violated Aureus and Schultz's equal protection rights in the manner in which he harassed them.

The parties did not dispute the common law claims. The malicious prosecution,[23] tortious interference,[24]

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22. A substantive due process violation is an alternative reading. The Court believes, however, that an equal protection claim is better suited to the facts.

23. The elements of a malicious prosecution claim are: (1) prior proceedings terminated in favor of the present plaintiff, (2) the absence of probable cause for the prior proceedings, (3) malice, which is defined as a purpose other than to secure the proper adjudication of the claim, and (4) a special injury flowing directly from the prior proceedings. *Friedman v. Dozorc*, 412 Mich. 1, 48 (1981).

24. The elements of a tortious interference claim are: (1) the existence of a valid business relationship or expectancy, (2) knowledge of the relationship or expectancy by the interferer, (3) an intentional and wrongful interference inducing or causing a breach or termination of the relationship or expectancy, and (4) resultant damage to the party whose relationship or expectancy was disrupted. *Badiee v. Brighton Area Schools*, 265 Mich.App. 343, 365-366 (2005).

intentional infliction of emotional distress,[25] and negligent infliction of emotional distress,[26] claims stand.

As for the overall reading, the conduct described in these counts assert a violation of Aureus and/or Schultz's equal protection rights.[27]

Just because Aureus and Schultz inappropriately pled Counts 3 through 6 as state tort law claims that

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25. The elements of an intentional infliction of emotional distress claim are: (1) extreme and outrageous conduct; (2) intent or recklessness; (3) causation; and (4) severe emotional distress. *Lewis v. LeGrow*, 258 Mich.App 175, 196 (2003).

26. The elements of a negligent infliction of emotional distress claim are: (1) serious injury threatened or inflicted on a person, not the plaintiff, of a nature to cause severe mental disturbance to the plaintiff, (2) shock by the plaintiff from witnessing the event that results in the plaintiff's actual physical harm, (3) close relationship between the plaintiff and the injured person (parent, child, husband, or wife), and (4) presence of the plaintiff at the location of the accident at the time the accident occurred or, if not present, at least shock "fairly contemporaneous" with the accident. *Hesse v. Ashland* Oil, Inc., 466 Mich. 21, 34 (2002).

27. The United States Supreme Court has upheld the "class of one" principle for equal protection claims by a citizen alleging unequal treatment by a state actor. *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000). *See also* Nicole Richter, Note, *A Standard for "Class of One" Claims Under the Equal Protection Clause of the Fourteenth Amendment: Protecting Victims of Non-Class Based Discrimination from Vindictive State Action*, 35 Val. U.L. Rev. 197 (2000-2001).

generically violate the Fourteenth Amendment does not mean the conduct alleged does rise to a § 1983 violation. Discussing the "§ 1983 malicious prosecution claim" terminology in *Albright v. Oliver,* 510 U.S. 266 (1994), a treatise states:

> Finally, it is worth noting that the Supreme Court, unlike some of the circuits dealing with § 1983 malicious prosecution actions and confused by the tort-like terminology, wisely did not lose sight of what was really at stake in *Albright:* was there a constitutional violation alleged? All of the opinions [in *Albright]* properly focused on this question and were not led astray by the characterization of the plaintiff's claim as a § 1983 malicious prosecution claim. That is, their analysis was not determined by tort principles but rather by constitutional principles, which should always be the case. . . ."

Sheldon Nahmod, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION, 4th ed. § 3:65.

Dockery's motion for summary judgment on Counts 3 through 6 is denied without prejudice. Dockery may renew his motion for summary judgment on the state law tort claims and the equal protection claim, including the issue of qualified immunity.

Appendix C

5. Dockery: Individual Rights of Action Arising Under the Second Amendment.

Dockery says Count 1 must be dismissed because the Second Amendment, guaranteeing "the right of the people to keep and bear Arms," does not create a private remedy in individuals who claim to have lost the ability to have a firearm. *U.S. v. Warin*, 530 F.2d 103, 106 (6th Cir.1976) (creating the "collective rights" model). Consequently, constitutional claims relying on the Second Amendment under § 1983, Dockery says, must be dismissed. *Pencak v. Concealed Weapon Licensing Bd.*, 872 F.Supp. 410 (E.D.Mich.1994).

Plaintiffs respond that the Fifth Circuit has held that the Second Amendment does confer an individual actionable right. *United States v. Emerson*, 270 F.3d 203 (5th Cir.2001). This Court must follow the Sixth Circuit rule. Dockery's motion for summary judgment is GRANTED and Count 1 is DISMISSED.

6. Qualified Immunity.

a. Legal Standard.

Dockery asserts the defense of qualified immunity. This defense applies only to Count 2 for the illegal search and seizure of the shotgun.

A government official may be protected from liability for his or her actions by qualified immunity. Qualified immunity is determined under a two-part test. The first

inquiry is whether the facts show the officers' conduct violated a constitutional right. If no right is violated, the inquiry ends. If a violation is found, the second inquiry is whether the constitutional right was clearly established in light of the specific context of the case. *Saucier v. Katz*, 533 U.S. 194, 202 (2001). Qualified immunity arises out of a government official's performance of discretionary acts when their acts do not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Greene v. Barber*, 310 F.3d 889, 894 (6th Cir.2002).

b. Discussion.

Dockery says he did not violate a clearly established constitutional right[28] when he took the shotgun. Dockery says he took the shotgun only after Schultz disavowed ownership of it, leading Dockery to believe the gun was unprotected. In these circumstances, Dockery says he had probable cause to take the shotgun.

Schultz says "probable cause means something less than evidence that would justify . . . conviction, but more than bare suspicion." *Greene v. Reeves*, 80 F3d 1101, 1105 (6th Cir.1996) (internal citations omitted). Schultz says Dockery seized his legally-owned shotgun without a warrant and without probable cause, and the City's

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28. It is unclear whether Dockery is saying that he did not violate a constitutional right, or that the right was not clearly established.

return of the shotgun later that day acknowledged this fact, despite Dockery's statement that the gun was illegal.

Dockery says the fact that the gun was returned later the same day means the seizure claim is de minimus.

c. Resolution.

Schultz and Dockery describe remarkably different versions of events surrounding the seizure of the shotgun. Seizing a weapon without probable cause is a constitutional violation. Whether Dockery violated a clearly established constitutional right turns on whose version of events is deemed credible. The Court cannot make such a credibility determination. Summary judgment on the issue of qualified immunity as to Count 2 is DENIED.

C. Conclusion.

For the reasons stated above, all claims against the City and Count 1 against Dockery are DISMISSED. The following parties and claims remain:

- Count 2, Schultz's § 1983 claim that Dockery illegally seized the shotgun;

- Count 3, Schultz and Aureus' claim against Dockery for malicious prosecution;

- Count 4, Aureus' claim against Dockery for tortious interference with its business;

- Count 5, Schultz's claim against Dockery for intentional infliction of emotional distress;

- Count 6, Schultz's claim against Dockery for negligent infliction of emotional distress; and,

- Aureus and Schultz's § 1983 claim against Dockery for unequal treatment regarding the conduct described in Counts 3 through 6.

SO ORDERED.

s/ Avern Cohn
AVERN COHN
UNITED STATES DISTRICT JUDGE

Dated: June 1, 2006

CITATIONS ISSUED BY DOCKERY.

DATE	CITATION #	RECIPIENT	CAUSE	SERVICE
May 17, 2001	Unknown	Pallisco	no license	No
May 17, 2001	Unknown	Pallisco	no certificate of occupancy	No
May 17, 2001	Unknown	Pallisco	oil dumping	No
May 25, 2001	***V-508-853***	Schultz	no certificate of occupancy	yes
May 25, 2001	V-508-854	Behm	unknown–no copy of the citation	unknown
May 25, 2001	V-508-855	Behm	unknown–no copy of the citation	unknown
May 25, 2001	***V-508-856***	Schultz	no certificate of occupancy	yes
May 25, 2001	***V-508-881***	Aureus	oil dumping	yes
Sept. 9, 2001	unknown	Aureus	oil dumping	no
Sept. 9, 2001	unknown	Aureus	oil dumping	no
Sept. 12, 2001	V-509-567	unknown	unclear–plaintiffs fail to specify	yes
Sept. 12, 2001	V-509-568	unknown	unclear–plaintiffs fail to specify	yes
Sept. 12, 2001	V-509-569	unknown	unclear–plaintiffs fail to specify	yes
Sept. 12, 2001	***V-509-570***	Schultz	oil dumping–see Oct. 7, 2001	yes
Sept. 26, 2001	***V-509-584***	Hellman	oil dumping	unknown
Sept. 26, 2001	***V-509-585***	Aureus	oil dumping	unknown
Oct. 1, 2001	***V-509-604***	E&M	oil dumping	unknown
Oct. 4, 2001	***V-509-622***	Magnum	oil dumping	unknown
Oct. 5, 2001	unknown	Aureus	oil dumping	unknown
Oct. 7, 2001	***V-509-570***	Schultz	oil dumping–see Sept. 12, 2001	yes
Oct. 16, 2001	***V-509-601***	E&M	oil dumping–citation out of order	yes
Oct. 16, 2001	***V-509-619***	Magnum	oil dumping–citation out of order	yes
Nov. 19, 2001	unknown	Magnum	oil dumping	unknown
Dec. 20, 2001	unknown	Magnum	oil dumping	no
Dec. 20, 2001	unknown	E&M	oil dumping	no
Dec. 20, 2001	unknown	Pallisco	oil dumping	no

No. 08-1138

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

AUREUS HOLDINGS, LTD. and DONALD SCHULTZ,

Petitioners,

v.

THE CITY OF DETROIT and JAMES DOCKERY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. WHETHER PETITIONERS HAVE FAILED TO PRESENT A TRUE CONFLICT BETWEEN THE SIXTH CIRCUIT OPINION AND *PAYTON v. NEW YORK*, 445 U.S. 573 (1980), OR COMPELLING REASONS TO WARRANT REVIEW WHEN THE EVIDENCE SUPPORTED THE JURY VERDICT THAT DOCKERY DID NOT VIOLATE THE FOURTH AMENDMENT BECAUSE UNDER THE TOTALITY OF THE CIRCUMSTANCES PROBABLE CAUSE EXISTED TO SEIZE THE SHOTGUN IN PLAIN VIEW IN A BUSINESS.

II. WHETHER PETITIONERS HAVE FAILED TO PRESENT COMPELLING REASONS TO WARRANT REVIEW OF THE PETITION WHERE THE SIXTH CIRCUIT'S OPINION AFFIRMING THE DISTRICT COURT'S DISMISSAL OF PETITIONERS' CLAIMS AGAINST THE CITY DOES NOT RAISE A CONFLICT WITH *MONELL v. DEPARTMENT OF SOCIAL SERVICES*, 436 U.S. 658 (1978), AS THE SIXTH CIRCUIT CORRECTLY HELD THAT PETITIONERS FAILED TO PROVE OR TO CREATE A GENUINE ISSUE OF MATERIAL FACT OF THE EXISTENCE OF A CUSTOM OR DE FACTO POLICY THAT RESULTED IN THE VIOLATION OF CONSTITUTIONAL RIGHTS.

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COUNTER-STATEMENT OF NATURE OF THE CASE

This is a civil rights action filed under 42 U.S.C. §1983, and the Second, Fourth, Fifth and Fourteenth Amendments to the United States Constitution.

This case arises out of Petitioner Aureus Holdings, Ltd. (Aureus), a scrap metal processor, and Petitioner Donald Schultz (Schultz), an employee of Aureus, claims against the City of Detroit and Respondent James Dockery, a Detroit Police Officer assigned to the Detroit Environmental Enforcement Police Section called (DEEP) of the Detroit Police Department for issuing numerous citations against Aureus and Schultz which Petitioners assert were without probable cause. Petitioners also complained that Respondent Dockery in other ways harassed Petitioners under a de facto policy approved by Respondent City which deprived them of their rights and seized Shultz's shotgun without a warrant. (Petition Appendix (Pet. App.) A, p. 2a, Pet. App. C, p. 30a).

Petitioners appeal the jury verdict of no cause of action in favor of Respondent James Dockery. Petitioners also appeal the district court's grant, in part, of Respondents' Motion for Summary Judgment which dismissed the City of Detroit. (Pet. App. C, p. 50a).

Petitioners' seven-claim Complaint alleged the violation of the Second and Fourteenth Amendment for illegally seizing a shotgun, (First Claim, Schultz); violation of the Fourth and Fourteenth Amendments for illegally seizing the shotgun, (Second Claim,

Schultz); and deprivation of a property interest without due process of law in violation of the Fourth, Fifth and Fourteenth Amendments for allegedly revoking the business license and failing to renew the license, contrary to the City Code. (Seventh Claim, Aureus against the City).

On December 19, 2005, Respondents filed a Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56(c). The district court granted in part the Respondents' Motion and dismissed Petitioners' Second Amendment claim (First Claim), and all claims against the City of Detroit (Seventh Claim). (Pet. App. C, pp. 32a, 48a-50a, 51a).

On July 23, 2007, following a five-day (5) jury trial, a jury returned a verdict in favor of Respondent Dockery and against Petitioners. The jury found for Dockery on Aureus Holdings, Ltd.'s malicious prosecution claim and tortious interference with business claim, and on Schultz's claim for violation of constitutional rights in seizing a shotgun and his malicious prosecution claim. (Pet. App. A, p. 14a).

Petitioners filed a Motion for New Trial pursuant to Fed. R. Civ. P. 59(a) on the ground that the verdict was against the weight of the evidence. The district court denied the Motion for New Trial. (Pet. App. A, p. 2a, Pet. App. B, p. 23a). In the Petitioners' Motion for New Trial Petitioners argued that the verdict against Aureus and Schultz was against the clear weight of the evidence. Further that the district court erred in

granting summary judgment in favor of the City. (Pet. App. A, p. 2a).

COUNTER-STATEMENT OF FACTS

Background

This litigation arises from the Petitioners' operation of a metal recycling business at 17245-17287 Mt. Elliott in the City of Detroit. Petitioner Aureus Holdings, Ltd., is a Michigan corporation which did business as Magnum Recycling, Inc. Petitioner Donald Schultz was an employee of Aureus and also a trucking company named E & M Transportation.

Respondent James Dockery is a 28-year veteran of the City of Detroit Police Department, who was assigned to the Detroit Environmental Enforcement Police section (DEEP) of the department during the events underlying this action.

The events giving rise to the Petitioners' claims arise from the issuance of a series of separate enforcement citations and investigative visits to the Petitioners' location by Dockery. Between May and December 2001 Dockery issued 26 separate citations to companies or individuals he found at the Mt. Elliott location. Ten of the citations were specifically issued to Aureus by name or Magnum Recycling; six were issued to Schultz. (Pet. App. C, pp. 34a, 38a, 39a, 43a).

Generally, Dockery issued citations to Aureus/Magnum for violations of City ordinances such as failure to have a Building Department issued Certificate of Occupancy to conduct a metal recycling business, or a properly issued City of Detroit business license or for violations of state or city environmental laws and regulations because industrial and hazardous waste oil was being dumped on the ground at the facility. The citations to Schultz contained similar charges.

Nine of the citations came on for hearings before Judge David S. Robinson Jr. of the 36th District Court for the City of Detroit, handling the court docket for environmental citations. The parties undertook negotiations to resolve them through settlement. Ultimately, on November 6, 2003, with the court's encouragement, the parties agreed to a resolution of nine specifically listed citations by an agreement that Respondents would remediate the environmental violations by installing underground storage tanks to receive any waste oil draining from the recycled metal. (Pet. App. C, p. 42a).

Facts Surrounding the Citations

May 17, 2001

Aureus entered into an agreement with Consumers Scrap (Consumers) in early 2001 for the lease and purchase of the Scrap Yard and Magnum trade name. Aureus took control of operations under a lease in

April, 2001. Aureus began operating the Scrap Yard without a license. (Pet. App. C, pp. 33a-34a).

Metal shavings are among the materials delivered to the Scrap Yard from automobile manufacturers. Metal shavings are coated with cutting oil. Some oil drains into the ground when the shavings are deposited at the Scrap Yard.

On May 17, 2001, Officer Dockery completed a follow-up investigation of a business near the location of the scrap yard at Mt. Elliott. He observed the name Consumers Scrap/Magnum on the sign at Petitioners' location. Because he recalled Consumers Scrap had a number of environmental problems in the past, he decided to observe the location to determine the current status of the business.

Officer Dockery looked around the location and observed piles of metal shavings and a "oily substance running down off the shavings" to the front of the property to the City sewer. (R. 54, Trial Tr. 7/19/07, pp. 19-23).

Aureus had never applied for a business license in its own name. (Pet. App. C, p. 33a). After an investigation of the existence of the license, Dockery issued Thomas Pallisco Thomas a citation for operating the scrap yard without a business license, for failing to have a certificate of occupancy which Dockery discovered from the Building and Safety Department, and for violations of state and local laws for illegal dumping and improper disposal of waste oil. The oil was

being dumped on the ground and draining into the public sewer system.

Once Dockery left the scrap yard, he contacted the Consumer Affairs Department to determine the status of the license and found out that the Consumers Scrap license expired in 2000 and found no record of a license for Aureus.

May 25, 2001

On May 25, 2001, despite the lack of a license, Petitioner Schultz and James Behm opened the Scrap Yard. Dockery drove by the premises to make sure Petitioners had received a license, made some observations and took photos. (Pet. App. C, p. 33a). Petitioners had not received a license but claimed they were operating under a transfer license from Consumers, but Consumers' license had expired in 2000 and there is no proof that the Detroit City Code provided for a transfer. (Pet. App. C, p. 34a).

Dockery issued to Donald Schultz, the manager of the facility, two citations for operating without a certificate of occupancy and for operating a transfer station and business without a license, and one to Aureus, for the improper disposal of waste oil.

On June 16, 2001, Aureus received a license retroactive to April 1, 2001.

September 12, 2001 – The Shotgun

On September 12, 2001, Dockery entered the office at the Scrap Yard to follow up on the progress of the facility after the court date and observed what he considered to be violations similar to what he had issued the citations for previously. On that day, Schultz was working but denied he was the manager of the facility. Another man and Schultz went back and forth as to who the owner was. Dockery asked Schultz for identification, but Schultz refused to provide it.

A shotgun was in plain view in the office. (Pet. App. B, pp. 23a-24a); (See generally Pet. App. C, pp. 36a-37a). Dockery testified he asked Schultz who owned the shotgun and that he believed Schultz stated he owned it. Schultz still refused to provide identification or to provide proof that he owned the shotgun. Dockery believed that he could not leave an illegal sawed-off shotgun at a place of business where no one identified himself as the owner of the premises or as the facility manager or provided proof of ownership of the shotgun. The gun was not in a back office but near a front office in plain view. Since no one proved ownership Dockery considered it abandoned at the location.

Dockery took the shotgun to the 11th Precinct and invited Schultz to follow him. Schultz followed him to the station. Schultz spoke to the lieutenant, showed the lieutenant his identification and informed

the lieutenant that he was the manager of the facility, and Schultz's gun was returned to him.

Dockery wrote three citations to Schultz for: (1) failure to remove a hazardous condition (2) failure to provide identification for an investigation (3) and the improper disposal of waste. Dockery observed 50 gallons of anti-freeze draining on the ground, which could run into the sewers. Dockery did not issue a citation to Schultz for the shotgun because Schultz finally proved his identity and that he was the owner.

Dockery was hopeful that the June meetings and court hearings would have led to a change in the operations of the Scrap Yard once Petitioner Aureus agreed to have the new tanks installed, but he saw no change in operations.

December 20, 2002

On December 20, 2002, Dockery went to the Scrap Yard. A Detroit Consumer Affairs representative, Mr. John Fuqua came to the location also. Investigator Fuqua removed the business license and left. (Pet. App. C, p. 44a; R. 54, Trial Tr. 7/19/07, pp. 86-89). Dockery had nothing to do with the removal of the license. Consumer Affairs indicated that it was issued in error and that it should not have been issued.

Michigan Department of Environmental Quality and Detroit Water and Sewage Inspections and Violations

During the relevant time period Aureus/Magnum was also the subject of inspections by the State of Michigan Department of Environmental Quality (MDEQ) and the Detroit Water and Sewage Department (DWSD). City Ordinance 3496 prevents oils from being dumped into the sewer which go towards the sewage plant. As a result of the anonymous complaint received by MDEQ which stated Aureus was involved in "scrap metal facility dumping fluids" and stated other environmental violations at the scrap yard, a Pollution Emergency Alerting System (PEAS) Incident Report Form was filed on two occasions.

Bennie Howard, an employee of Detroit Water and Sewage Department (DWSD), and Michigan Department of Environmental Quality (MDEQ) representative, Jeanette Noechel, conducted a joint visit and inspection of the premises on November 13, 2002, which ultimately led to the issuance of an extensive December 13, 2002 "Letter of Warning" by the (MDEQ) State to Magnum, Aureus and E & M Transportation, detailing fourteen specific violations of state law. Their observations at the scrap yard of pools of liquid waste and other conditions, coupled with the samples taken from the pools of liquid waste on the ground that could be discharged into the sewer, indicated that Aureus/Magnum was in violation of the

City Ordinance which prevents dumping of waste oil into the City sewer.

Ms. Noechel's inspection found violations for the facility and testified that if the kind of conduct that she observed in November 2002 occurred in May 2001 when Dockery issued the citations, Aureus' actions were illegal. (Pet. App. C, p. 43a).

REASONS FOR DENYING THE PETITION

The Court should deny the Petition for a Writ of Certiorari and the Sixth Circuit Court of Appeals Opinion should stand. The Petition presents no compelling reason supporting the exercise of the Court's jurisdiction.

The Sixth Circuit's decision does not conflict with the United States Supreme Court decision of *Payton v. New York*, 445 U.S. 573 (1980). Petitioners try to inflate the impact of this case into one presenting an important federal question regarding the parameters of the seizure of a shotgun in a business which received several environmental law citations in plain view, but it is nothing of the sort. The Sixth Circuit Court of Appeals correctly determined that the jury was properly instructed on the law and they were entitled to conclude that the temporary seizure was not so unreasonable as to have violated Schultz's constitutional rights. The jury verdict was not plainly unreasonable and the district court's

denial of the motion for new trial was not an abuse of discretion.

In the district court and in the Sixth Circuit, Petitioners did not present the specific argument that a seizure of a visible weapon in plain view violated the Fourth Amendment unless it is associated with criminal activity in light of *Payton*. Therefore, since the Petitioners did not raise this specific issue in the Sixth Circuit the argument is waived. See *Thurman v. Yellow Freight Systems*, 97 F.3d 833, 835 (6th Cir. 1999).

The holding of *Monell v. Department of Social Services*, 436 U.S. 658 (1978), is not in conflict with the Sixth Circuit Court of Appeals' decision. The Sixth Circuit's position is that Aureus did not submit evidence to create a genuine issue of material fact of a de facto policy or custom in the instant case. The Sixth Circuit's opinion in no way challenges or conflicts with, expands or limits the scope of *Monell's* holding as Petitioners argue in an attempt to manufacture a conflict with the holding of the seminal case. To the contrary, the Sixth Circuit's decision is entirely consistent with all relevant precedent and was premised upon well-settled principles of law consistently applied by courts.

Petitioners merely disagree with the court's determination that the evidence presented by Petitioners did not establish a "custom" or a "de facto policy" or create a genuine material issue of fact of the same. Accordingly, this legal issue and the factual

circumstances of this case do not warrant review by the Court.

I. THE SIXTH CIRCUIT COURT OF APPEALS DID NOT ABUSE ITS DISCRETION IN AFFIRMING THE JURY VERDICT THAT DOCKERY'S SEIZURE OF THE SHOTGUN DID NOT VIOLATE THE FOURTH AMENDMENT AND UNDER THE FACTS OF THIS CASE REVIEW IS NOT WARRANTED AS THIS CASE DOES NOT CONFLICT WITH *PAYTON v. NEW YORK*.

The Sixth Circuit correctly affirmed the jury verdict which found a no cause of action on Petitioner Schultz's Fourth Amendment seizure of the shotgun claim. The court reviews a district court's denial of a motion for a new trial under the highly deferential abuse of discretion standard. *Taylor v. Teco Barge Line, Inc.*, 517 F.3d 372 (6th Cir. 2008). The Sixth Circuit will find an abuse of discretion only when it has a definite and firm conviction that the trial court committed a clear error of judgment. *Radvansky v. City of Olmsled Falls*, 496 F.3d 609, 614 (6th Cir. 2007). New trials are not to be granted on the ground that the verdict was against the great weight of the evidence unless the verdict was unreasonable. Thus, if a reasonable juror could reach the challenged verdict, a new trial is improper. *Taylor*, *supra*, quoting *Barnes v. Owens-Corning Fiberglas Corp.*, 201 F.3d 815, 820-821 (6th Cir. 2000) (citations omitted). A verdict is not unreasonable simply because

different conclusions could have been drawn or different results are more reasonable. *United States v. L.E. Cook Co., Inc.*, 991 F.2d 336, 343 (6th Cir. 1993); *Woodbridge v. Dahlberg*, 954 F.2d 1231, 1234 (6th Cir. 1992). Accordingly, unless a jury verdict is unreasonable and against the clear weight of the evidence, and not merely if a panel might have adjudged the issues differently, the district court's denial of a motion for a new trial will stand. See *Bell v. Johnson*, 404 F.3d 997, 1003 (6th Cir. 2005).

The trial court properly determined it had no basis to reverse the jury verdict and the jury's decision was not unreasonable. (Pet. App. A, pp. 3a-4a, Pet. App. B, pp. 23a-24a). Even if the district court or the Sixth Circuit would have reached a different conclusion it was not within the court's province to reverse the jury's verdict in this case.

"Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed." *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979). In *Crockett v. Cumberland College*, 316 F.3d 571 (6th Cir. 2003), the Sixth Circuit stated:

> The probability of criminal activity is assessed under a reasonableness standard based on "an examination of all facts and circumstances within an officer's knowledge at the time of an arrest." *Estate of Dietrich v. Burrows*, 167 F.3d 1007, 1012 (6th Cir. 1999); see also *Hunter v. Bryant*, 502 U.S. 224, 228,

> 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991) ("The court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be construed . . . after the fact."); *Klein v. Long*, 275 F.3d [544] at 550 [(6th Cir. 2001)] ("Probable cause is assessed 'from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight[.]' "); *Gardenhire [v. Schubert]*, 205 F.3d [303,] at 315 [(6th Cir. 2000)]; . . .

In the case at bar, Officer Dockery asked Donald Schultz who was in charge of the Aureus' scrap yard. Aureus had been charged with various environmental offenses and failure to operate with a business license. Schultz indicated that not only was he not in charge, but told Officer Dockery that another employee at the location was the manager. As it turned out, Schultz was blatantly lying to Dockery because Schultz was indeed the manager of the subject scrap yard. Dockery testified that Schultz refused to produce any identification and that he ascertained that Schultz was fabricating once he spoke with the employee who informed Dockery that Schultz was the manager. Dockery observed a loaded short barreled shotgun, with a pistol grip in plain view in the office area where it could be reached by virtually anyone in the office area. He asked Schultz who owned the gun, and Schultz claimed it belonged to him. Dockery then asked Schultz for identification, and to show proof of

ownership and Schultz refused. Dockery believed the weapon was an illegal sawed-off shotgun. (Pet. App. C, p. 37a; Pet. Brief, p. 14).

Dockery inadvertently came upon the shotgun in the business while asking for the owner of the premises due to his observations of continuing environmental violations despite the agreement made in court to remedy the violations. It was reasonable for Dockery to seize the sawed-off shotgun which was in plain view when Dockery was lawfully on the grounds observing the continuing environmental violations. Probable cause exists to seize the sawed-off shotgun if the incriminating nature of the sawed-off shotgun was immediately apparent. *United States v. Truitt*, 521 F.2d 1174, 1177 (6th Cir. 1975). In *Truitt*, the Sixth Circuit held that "as far as sawed-off shotguns are concerned, probable cause to believe that they are contraband is immediately apparent and that such 'intrinsically incriminating' items may be seized without further investigation into whether such weapons are registered as required by federal or state law." *Id.* If Schultz would not provide identification, he certainly did not provide proof of registration of the item. The totality of circumstances warrant seizure of the sawed-off shotgun. See *United States v. Szymkowiak*, 727 F.2d 95, 98 (6th Cir. 1984). In *Truitt*, the court recognized that there are "so few legitimate uses for a sawed-off shotgun there is a probability that the weapon is not registered." *Id.* at 1177. Further, the Sixth Circuit held that a sawed-off shotgun in private hands is not an intrinsically

innocent object, therefore, the possession of it is a serious crime except under extraordinary circumstances. Therefore, under the totality of the circumstances, Dockery's observation of the sawed-off shotgun in plain view would have warranted on officer of reasonable caution in the belief that the weapon is illegally possessed. *Id.* In *United States v. Dunlap*, 209 F.3d 472, 478 n. 12 (6th Cir. 2000), the court took note that sawed-off shotguns are extremely dangerous and usually have no purpose other than the furtherance of illegal activity. Hence, Dockery's actions were reasonable as probable cause existed to seize the weapon. The jury verdict was reasonable based on the evidence before it and was not against the great weight of the evidence as Petitioners contended in the Sixth Circuit.

Of course, Schultz's version of what occurred was different than Dockery's, creating a classic question of fact to be determined by the jury. There is little question that reasonable jurors who chose to believe Dockery could find that probable cause existed for checking ownership of the loaded sawed-off shotgun and for failure to produce identification.

The seizure was reasonable under the circumstances when no one identified themselves as owner of the scrap yard and Schultz refused to provide identification or proof of ownership of the shotgun that was not in a locked and secured place. It was visible and accessible to the public. Dockery's actions were minimally intrusive. On the very day of the incident Dockery and Schultz went to the police station to

determine ownership of the gun. Schultz then produced identification to the lieutenant and the shotgun was returned to him, the very same day. Officer Dockery's actions were reasonable when Schultz was not cooperative and an unclaimed sawed-off shotgun was on the premises.

The lynchpin of the Fourth Amendment is reasonableness: it forbids the unreasonable seizure in violation of the Fourth Amendment. The reasonableness of a seizure is determined on a case-by-case basis by weighing the governmental interest that justifies the seizure against the degree of intrusion upon personal autonomy the seizure entails: the greater the intrusion, the greater the governmental interest needed to justify it. *Terry v. Ohio*, 392 U.S. 1, 20-21 (1989). The facts to be considered in weighing the competing interests are those "available to the officer at the moment of the seizure." *Id.* at 21-22.

Dockery's actions were reasonable when balanced under the circumstances and the facts he had knowledge of at the time of the seizure. Dockery was investigating environmental offenses with uncooperative persons operating without a license. The visibility of a shotgun was a danger to citizens. Even if Schultz stated the shotgun was his, Officer Dockery was under no obligation to believe that the gun belonged to him without proof of ownership and identification documentation from Schultz. The determination of reasonableness is made by balancing "the gravity of the public concerns served by the

seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." See *Illinois v. Lidster*, 540 U.S. 419 (2004) (police investigated a hit and run homicide days later, set up a roadblock and questioned drivers for information-seizure of a driver for driving under the influence (DUI) was reasonable and did not violate the Fourth Amendment although police had no reason to believe drivers had information of the crime, but observed the driver DUI).

Dockery's belief that the gun was an illegal modified "sawed-off" shotgun was reasonable under the circumstances and the jury was entitled to believe the credibility of his testimony. The decisions of *United States v. Gonzalez*, 334 F. Supp. 2d 275 (E.D. N.Y. 2004), and *United States v. Mines*, 883 F.2d 801 (9th Cir. 1989), do not provide a basis to support the existence of a compelling reason to grant review of this Petition or to establish that the Sixth Circuit Court of Appeals' decision is in conflict with *Payton v. New York*. *Gonzalez* recognized that an object may be seized without a warrant if the police are lawfully in a position to view the object and believe its incriminating character is immediately apparent. *Gonzalez* found that the seizure of photographs from a home was unreasonable when the police officers were unaware of its incriminating character until after the seizure. Here in the instant case, Dockery viewed a sawed-off shotgun in plain view, unclaimed by anyone on a premises with numerous environmental

violations. The danger of a shotgun was readily apparent especially when one does not know if the gun was registered and no registration or ownership information was forthcoming.

This is not a case that contradicts with the holding of *Payton* on legal or policy grounds. This is a case in which the jury determined that Dockery's actions under the totality of the circumstances were reasonable.

II. THE SIXTH CIRCUIT CORRECTLY AFFIRMED THE GRANT OF SUMMARY JUDGMENT TO THE CITY BECAUSE PETITIONERS FAILED, AS A MATTER OF LAW, TO CREATE A GENUINE ISSUE OF MATERIAL FACT THAT THE CITY HAD AN UNCONSTITUTIONAL DE FACTO POLICY OR CUSTOM WHICH RESULTED IN THE DEPRIVATION OF PETITIONERS' CONSTITUTIONAL RIGHTS.

The Sixth Circuit correctly affirmed the district court's grant of summary disposition to the City because Petitioners failed to prove the City of Detroit adopted a custom or de facto policy which resulted in the deprivation of Petitioners' rights. Petitioners failed to show a custom deliberately chosen to be followed by final policy makers of the City of Detroit which deliberately decided not to follow the City's procedures and caused a violation of constitutional rights. Petitioners failed to establish a City custom

which resulted in or was affirmatively linked to the deprivation of Petitioners' constitutional rights.

A. The Sixth Circuit's Affirmation of the Trial Court's Grant of Summary Judgment of Petitioners' Procedural Due Process Claim Was a Correct Interpretation of *Monell v. Department of Social Services* and the Correct Application of its Standard to the Case.

Aureus claimed that the City of Detroit deprived it of its procedural due process right to the license when it revoked its purported license and after returning it, failed to renew it in contravention of the City code and in its own policy (Pet. App. A, p. 10a, Pet. App. C, p. 5a). The Petitioners alleged the City through its Department of Consumer Affairs, "instituted a de facto policy of deliberate indifference in ignoring prescribed procedure in confiscating, then failing to renew, the business license of Aureus without due process of law". (Pet. App. A, p. 11a).

The Sixth Circuit correctly interpreted and applied the seminal case of *Monell v. Department of Social Services*, 436 U.S. 658 (1978). The Sixth Circuit and the district court's correct holdings did not challenge or conflict with *Monell*. The decisions recognized that a municipality may be liable under §1983 upon execution of a government's policy or custom which caused the alleged constitutional violation. (Pet. App. C, p. 48a). Further, the district court's decision

recognized that a local government can be liable when a government action is "so permanent and well settled as to constitute a custom or usage with the force of law, or when the government's official policy is the moving force of the constitutional violation" (citation omitted) (Pet. App. C, p. 49c). The opinions indicated that Petitioners failed to prove a custom or de facto policy and therefore the City was correctly dismissed. (Pet. App. A, pp. 11a-12a). Petitioners disagree with the Sixth Circuit and district court holdings that Petitioners failed to present genuine issues of material facts sufficient to prove their claim of the existence of a custom or de facto policy under *Monell*. Therefore, no true conflict exists and the district court and Sixth Circuit decisions do not contradict, narrow or undermine the seminal case of *Monell*.

Petitioner Aureus failed to identify, plead or prove a specific municipal policy or custom deliberately chosen to be followed by final policy makers of the City of Detroit to encourage the taking of licenses without due process of law. Petitioners failed to prove that the City of Detroit adopted a de facto policy or custom of malicious prosecution or taking business licenses without justification which resulted in the deprivation of constitutional rights. Lastly, Petitioners failed to prove or establish evidence that a city de facto policy or custom, resulted in, or was affirmatively linked to, the deprivation of Petitioners' constitutional rights. In order to prevail in a civil rights suit filed against a city or other governmental

entity, the Petitioners must allege and prove that the governmental entity had a policy or custom, the execution of which caused injury to the Petitioners and violated his or her constitutional rights. See *Monell v. Department of Social Services*, 436 U.S. 658, 692 (1978); *Stemler v. City of Florence*, 126 F.3d 856, 864 (6th Cir. 1997), cert. denied, 118 S. Ct. 1796 (1998).

Municipal liability attaches "*only where*" the policy or custom originates with the decision maker possessing the final authority to establish municipal policy with respect to the action ordered, and only where a deliberate choice to follow a course of action is made from among various alternatives by a decision maker with respect to the subject maker in question. *City of Canton v. Harris*, 489 U.S. 378, 390, 396 (1989); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480-481 (1986). There is no evidence that a de facto policy arose or that the policy originated with Respondent Dockery, who is a low level employee who does not make policy, or that it originated with a high official. Petitioners did not identify officials who had the final policy making authority and, therefore, the City is not subject to municipal liability. *Pembaur v. Cincinnati*, *supra*; *O'Brian v. City of Grand Rapids*, 23 F.3d 990, 1001 (6th Cir. 1997).

In the instant matter, Petitioners submitted no proof of the existence of a constitutionally offensive custom or de facto policy which represents a course of

action deliberately chosen by policy making authorities, and which is also causally connected to any asserted civil rights deprivation suffered by Petitioners. An act performed pursuant to a practice that has not been formally approved by an appropriate decision maker may fairly subject a municipality to liability only where that practice is so persistent and widespread as to have the force of law. *Gregory v. Shelby County*, 220 F.3d 433, 441-442 (6th Cir. 2000).

Additionally, Petitioners must also establish that such a de facto practice is deliberately indifferent to the rights of others. To be deliberately indifferent, the subject policy must be so "patently egregious" as to "shock the conscience". Whether written policy, or de facto practice, the standard of what is deliberately indifferent is very high. "Deliberate indifference" sufficient to support a §1983 action against a municipality is a stringent standard requiring proof that the government entity disregarded a "known or obvious risk." *Patterson v. City of Cleveland*, 173 F.3d 429 (6th Cir. 1999). Further, a custom or practice which does no more than enable errant conduct is similarly insufficient. *Pembaur v. Cincinnati, supra,* n. 11. See *Waters v. City of Morristown, TN*, 242 F.3d 353 (6th Cir. 2001); *Searcy v. City of Dayton*, 38 F.3d 282 (6th Cir. 1994).

There is no evidence of the existence of a de facto policy or persistent pattern of the City harassing scrap yard businesses without due process, or revoking licenses, which was the moving force behind an alleged unconstitutional deprivation of Petitioners'

property. *Thomas v. City of Chattanooga*, 398 F.3d 426, 429, 432 (6th Cir. 2005). There is no evidence that a policy making official of the City ever authorized or condoned the illegal seizure of a license or other conduct. There is no evidence of a direct causal link between a municipal policy or custom, or even to support the existence of a policy, and the alleged constitutional deprivation which allegedly caused injury to Petitioners. *City of Canton v. Harris*, *supra*, 489 U.S. 378 (1989); *Stemler v. City of Florence*, 126 F.3d 856, 864 (6th Cir. 1997), cert. denied, 118 S. Ct. 1796 (1998).

Petitioner Aureus offered no probative evidence of the existence of genuine issues of material facts in support of its contentions. Aureus only made colorable conclusory allegations and failed to create a genuine issue of material fact that an unconstitutional de facto policy or custom of failure to follow procedures, to failure to renew license, or policy of harassment existed so as to defeat the City's motion for summary judgment. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Petitioners failed to establish a custom of tolerance or acquiescence of failing to follow procedure as required in *Thomas v. City of Chattanooga*, 398 F.3d 426, 429 (6th Cir. 2005). Petitioners failed to present significant probable evidence to support his claim of an illegal custom that resulted in the deprivation of his rights. See *Anderson v. Liberty Lobby, Inc.*, *supra*, at 477 U.S. 242, 249, 252. Petitioners must show a

clear and persistent pattern of similar illegal or unconstitutional conduct and that the custom was the cause of the constitutional violation. *Thomas*, *supra,* at 432. None of the evidence established a practice, custom or de facto policy that was so common or widespread or illegal as to have the force of law that was unconstitutional. See *Gregory v. Shelby County*, 220 F.3d 433, 441-442 (6th Cir. 2000).

The district court reviewed the facts and record evidence. It correctly noted that Aureus argued that "Dockery, Fuqua, Lett" all lower level employees failed to follow the City policy for license revocation and renewals. However, there was no evidence that any City official capable of creating policy condoned said practices, and approved them or had knowledge of Dockery's, Fuqua's, or Lett's revocation. (Pet. App. C, p. 50a). Sending a letter copied to the Mayor does not show that they condoned or were deliberately indifferent to the rights of Aureus in this context. Petitioners did not demonstrate that the municipal action was taken with deliberate indifference of obvious consequences. A showing of negligence or heightened negligence will not suffice. *Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 407 (1997).

Petitioners cannot assert that the City of Detroit did not follow proper procedures. There is no protected interest in the procedure itself. See *United of Omaha Life Ins. Co. v. Solomon*, 960 F.2d 31 (6th Cir. 1992) (holding that a disappointed bidder to a government contract did not have a property interest in the state's

purchasing guidelines and so suffered no due process violation when the State failed to comply with its own procedures in awarding the bid). See also *LRL Properties v. Portage Metro Housing Authority*, 55 F.3d 1097, 1110 (6th Cir. 1995).

Detroit City Code § 30-1-1 et seq. sets forth the specifics of obtaining any license to do business in the City of Detroit. Detroit City Code § 49-8-1 deals with "Scrap Iron and Metal Processors" specifically. The City ordinance requires each business location to have a license before advertising (§ 30-1-4) and have the license on display. (§ 30-1-11). The ordinance also allows City officials to inspect the business premises and to deny, suspend or revoke business licenses in appropriate circumstances. (§ 30-1-16). One of the appropriate circumstances is in the case in which a business constitutes a hazard or threat to the peace, health, safety or welfare of the people. (§ 30-1-16(b)(2)(d)).

Petitioners' principle complaint for denial of due process is based on the alleged revocation of the business license by John Fuqua from the Department of Consumer Affairs on December 20, 2002. However, the ordinance does not create a protected liberty interest under the constitution sufficient to give rise to cause of action by Aureus. In *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454 (1989); *City of Canton v. Harris*, *supra*. (No violation when the regulations gave the official the discretion to exclude visitors if the official believed that a visitor would constitute a probable danger the visitor had no

protected liberty interest.) Petitioners cannot point to an aspect of the code that states a substantive limitation on Respondents when an environmental hazard existed and one is operating without a license. See *Pushy v. City of Youngstown*, 11 F.3d 652 (6th Cir. 1993) (the state crime victims act required notice to victims of the trial of the perpetrator, but because the statute did not mandate a specific result, if notice was not given: no liberty interest was created).

The Detroit ordinance at issue contains specific provisions with general grounds warranting denial, revocation or suspension for such generalized reasons as the business "constitutes a public nuisance" or "constitutes a hazard or threat to the peace, health, safety or welfare of the people of the city." (§ 30-1-16(b)(2)(a); § 30-1-16(b)(2)(d)). Likewise, the City ordinance specifies the procedure by which the licensee must be notified of a license suspension or revocation, but does not mandate a specific action by the City in the absence of the notice, or a specific entitlement of the licensee. Petitioners never challenged the constitutionality of the regulations. Significantly, Petitioners failed to show that Respondents' actions were arbitrary or capricious, in the sense that they have no substantial relation to the public health, safety, morals or general welfare. See *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1223 (6th Cir. 1992) (the court addressed a zoning ordinance, which principles are applicable here to determine if actions are arbitrary).

Altaire Builders, Inc. v. Village of Horseheads, 551 F. Supp. 1066 (W.D. N.Y. 1982), does not undermine the decision of the Sixth Court of Appeals in the instant case. The case demonstrates how Petitioners' facts and evidence, to prove a custom or de facto policy in the instant case, were insufficient to create a genuine issue of material fact or even colorable facts or evidence of a de facto policy. The case is clearly distinguishable from the instant case. In *Altaire*, the Board, a group of policy makers, made a decision not to approve the project and to take certain actions. In the instant case, there was no evidence of a policy maker from the City that made a decision to continually deny or ignore a request for a hearing.

Reed v. Village of Shorewood, 704 F.2d 943 (7th Cir. 1983), does not demonstrate that the decision of the Sixth Circuit was erroneous or that it conflicts with *Monell*. It is important to point out that the jury determined that Dockery was not liable for intentional interference with Aureus's business relations or for malicious prosecution (Pet. App. A, p. 7a, Pet. App. B, pp. 21a, 24-25a). Therefore it cannot be argued Dockery illegally interfered with Aureus's business as alleged by the Chief of Police in *Reed*. Further in *Reed* the court found that a genuine issue of material fact existed and that it had sufficient fact to show that the Village of Sherwood took acts that reflected governmental policy. In *Reed* there was no discussion of the existence of a de facto policy or custom as Petitioners argue in the instant case. In the instant case the court found that Petitioners did not raise a

genuine issue of material fact of the existence of a de facto policy. In the instant case, sending a letter to the Director of Consumer Affairs and Industry Services and a copy to the mayor does not show that the "policy makers were deliberately indifferent to their rights and had a custom of violating the rights of Petitioners or establish knowledge of a custom of wrongdoing. Petitioners' claim against the City was properly dismissed.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

AUREUS HOLDINGS, LTD. and DONALD SCHULTZ,

Petitioners,

v.

THE CITY OF DETROIT and JAMES DOCKERY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR REHEARING

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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UNITED STATES CONSTITUTION

Fourth Amendment 1, 3, 4

I. STATEMENT OF INTERVENING CIRCUMSTANCES OF A SUBSTANTIAL EFFECT AND GROUNDS FOR REHEARING NOT PREVIOUSLY PRESENTED

One of the core freedoms guaranteed by the United States Constitution is the Fourth Amendment Right to be free from unreasonable searches and seizures. This inherent freedom was recently addressed by the United States Supreme Court in the case of *Arizona v. Gant*, 129 S. Ct. 1710 (2009), which was decided while this Petitioner's Petition for Certiorari was pending. *Arizona v. Gant* addressed the issue of a warrantless automobile search conducted after the Defendant had exited his vehicle. This Court's opinion in *Gant* limited the scope of warrantless searches, and reaffirmed the validity of warrantless searches when officers have probable cause to believe in the occurrence of criminal activity. Both of these core principles are paramount concepts in Petitioner's instant Petition for Rehearing.

Gant was swiftly applied by the United States District Court for the Southern District of Ohio to allow the suppression of evidence seized at an airport checkpoint in *U.S. v. Fofana*, 2009 WL 1529815 (S.D. Ohio 2009). In light of *Gant's* apparent applicability to warrantless searches not exclusive to vehicle stops, this Honorable Court should grant the instant Petition for Rehearing. *Gant's* limitation on the scope of warrantless searches and seizures was not addressed in the Petition for Certiorari and is sole the issue to which this Petition for Rehearing is limited. The present case provides an opportunity for this Court to clarify the parameters of

a warrantless search and seizure of property as it relates to a lawful firearm on display in a public place.

II. *GANT* AND *FOFANA* EVOKE CONFUSION CONCERNING THE LEGALITY OF A WARRANTLESS SEARCH IN A PUBLIC PLACE

In *Gant* the Defendant was arrested for driving with a suspended license after he had exited his car in front of a residence that the police suspected was being used to sell drugs. Shortly before the Defendant arrived, two suspects had already been arrested and secured in the police officers' patrol car. The officers conducted a search of the Defendant's vehicle during which they discovered cocaine in the pocket of a jacket in the car's backseat. The Defendant was convicted of multiple drug crimes. This Court issued a divided opinion under which the majority affirmed the Arizona Supreme Court's holding that the arrest was unlawful. In the majority opinion, Justice Stevens addressed the Fourth Amendment concern of "... giving police officers unbridled discretion to rummage at will among a person's private effects." *Id.* at 1720. The Court also distinguished *Gant* from *New York v. Belton*, 453 U.S. 454 (1981) a case in which this Court had previously held that an arresting officer may contemporaneously search a vehicle after a lawful arrest of its occupant. The Court specifically stated that allowing vehicle searches incident to all arrests would serve no purpose except to provide police entitlement. The Court also noted that it would be and an ". . . anathema to the Fourth Amendment" to permit a warrantless search on that basis. See *Id.* at 1721.

The *Gant* opinion was swiftly applied to situations other than vehicular searches. For example, in *U.S. v. Fofana* (cited above), the Defendant alleged that evidence obtained as a result of an airport checkpoint search violated his Fourth Amendment right to be free from unreasonable searches and seizures. In that case the Defendant proceeded to a security checkpoint shortly after obtaining his boarding pass. At the checkpoint he presented a valid state driver's license. He subsequently passed through the metal detectors without setting off the alarm. He was however chosen as a random search "Selectee" by the airport's Computer Assistance Prescreening System. Security conducted a hand search of his luggage and discovered multiple passports and several envelopes filled with cash. The Defendant was subsequently arrested for carrying false identification.

The Defendant filed a Motion to Suppress the Physical Evidence that was obtained as a result of the airport search. The motion was granted. Citing *Gant*, the Trial Court observed that one of the central concerns underlying the Fourth Amendment was to prevent the State from having unchecked discretion to search an individuals possessions. That concern, according to the Court, is implicated if checkpoint searches are permitted to balloon from "narrowly defined searches for guns and explosives" into "generalized law enforcement searches." In other words, the need for heightened security does not render every conceivable checkpoint search reasonable. Where evidence demonstrates that the intrusiveness of a passenger's search is ramped-up based upon a desire to detect evidence of ordinary criminal wrongdoing, the search cannot be justified. *Id.*

Fofana demonstrates that the limitation on warrantless searches found in *Gant* is not reserved to automobile searches. In the Petition at issue, Respondent Office James Dockery's warrantless search of the Petitioner's property in a public place was conducted solely for the purpose of detecting purported wrongdoing. Indeed, there was no reason for Officer Dockery to suspect that the firearm was associates with any criminal activity. The unlawful search developed into the unlawful seizure of Petitioner's shotgun, thus resulting in a clear Fourth Amendment violation.

III. A REHEARING SHOULD BE PERMITTED TO DETERMINE THE SCOPE OF WARRANTLESS SEIZURES.

In light of this Court's recent clarification regarding the scope of unlawful searches, a rehearing should be permitted so that this Court may determine the legality of a warrantless search and seizure conducted in a public place where there was no evidence of criminal activity.

In the instant matter, the Plaintiff presented evidence establishing that Officer Dockery confiscated a legal and lawfully registered shotgun after entering public property and issuing a citation to Petitioner Schultz for failing to provide identification. *Gant* restated the long held rule that warrantless searches are per se unreasonable under the Fourth Amendment - subject to but a few exceptions. See *Id.* at 1716. One of these exceptions, the plain view doctrine, is only applicable in situations where there is probable cause to associate property with criminal activity. Officer Dockery's unlawful, unprovoked seizure of the shotgun

is a clear example of the "unbridled discretion to rummage through the Petitioner's property" that *Gant* seeks to prevent. In short, Officer Dockery did not seize the shotgun because he suspected criminal activity; he seized the shotgun because he wanted to. Furthermore, the damage suffered by the Petitioner was not diminished by the fact that the weapon was eventually returned, as there are no *de minimis* violations of the United States Constitution. *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 37 (2004).

The limitation that *Gant* places on the State's broad discretion to conduct a warrantless search should be applied to its authority to seize private property. The Trial Court erred when it determined that the jury's verdict was not against the great weight of evidence. Plaintiff's constitutional protection against unreasonable seizures was violated by Dockery, as it was unlawful for him to conduct a search and seizure of Petitioner's property absent probable cause and suspicion of criminal activity.

IV. CONCLUSION

Wherefore, Petitioner requests that this Honorable Court grant this Petition for Rehearing to clarify the scope of *Gant* and its implications on not just warrantless searches but also on warrantless seizures.

Respectfully Submitted,

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CERTIFICATE OF GOOD FAITH

The undersigned hereby certifies that this petition for rehearing is restricted to the grounds specified in Rule 44.2 of the Rules of the Supreme Court and is presented in good faith and not for delay.